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SIR HENRY MAINE.

I.

AMONG the many tributes that have been paid to the rare and high qualities of the late Sir Henry Maine, and among the acknowledgments of the irreparable loss caused by his death, it is right to record the great and manifold obligations, the public debt, of India towards a man whose writings and administrative work have done so much for that country. There is, as Sir H. Maine has himself said, a certain dulness and dimness attaching to all things Indian; but this very obscurity seems to enhance the effect of turning upon them the light of genius; for in certain hands the confused and opaque materials of Indian history and government become clear, interesting, and even picturesque. And India on her side has a kind of uncommon attraction for the very few men of brilliant intellect who have from time to time seen or studied the country, or who have taken part in its politics. To none of these is India's debt greater than to Sir Henry Maine. As a member, first of the Governor-General's Council, and afterwards, until his death, of the Council of the Secretary of State for India, he took a leading part in the solution of various arduous and complex legislative problems, and in some considerable measures of executive administration. Upon such questions he brought to bear his wide knowledge of and insight into archaic ideas and institutions, into the laws of their growth, decay, or development; while, conversely, his practical experience aided him to verify the result of his philosophic researches, and to expand their range. His method, his writings, and his speeches at the Indian Council Board have had a strong and lasting effect upon all subsequent ways of examining and dealing with these subjects, whether in science or practical politics. He possessed an extraordinary power of appreciating unfamiliar

facts and apparently irrational beliefs, of extracting their essence and the principle of their vitality, of separating what still has life and use from what is harmful or obsolete, and of stating the result of the whole operation in some clear and convincing sentence.

In a very sympathetic notice of Sir Henry Maine which appeared in the *Saturday Review* it is mentioned that he could read a thick volume, in such a way as to appropriate what concerned him in it, while an ordinary man read a hundred pages. In just such a swift and penetrating spirit he seems to have read India, the sacred literature, the ponderous histories, the innumerable volumes of official records, and the heavy bundles of papers that came before him as a member of the Government. He could throw a succession of rapid glances over its diversified social and political formation; and his remarkably accurate apprehension of its salient features commanded the admiration of all who knew the difficulty of such intellectual exploits. The local expert who, after years of labour in the field of observation, found himself with certain indefinite impressions of the meaning or outcome of his collected facts, often found the whole issue of the inquiry exactly and conclusively stated in one of Maine's lucid generalisations. Or else a suggestion thrown out, or a line of research indicated, would set the explorer on the right course, and show the real scope of the induction. And while he thus cast into orderly form a jumble of facts, or pointed with his divining rod to the sources of discovery, he never made the mistake of employing the incoherent, changeable, and inconsistent notions of primitive people to build up clear-cut positive theories. To such theories, which are epidemic in India, he invariably applied the tests of actual evidence and comparative experience; he gave to fictions their proper place and value; and by detaching what was fit to survive from what had lost its reason of existence he did much toward reconstructing the whole history of early Indian institutions on the basis most favourable for preserving their modified continuity.

The problem that has been for the last thirty years before the English Government of India is the adjustment of the mechanism of a modern State to the habits and feelings of a vast mixed multitude in various stages of what we have decided to call Progress. In such a period of unusually rapid transition Maine's instinct of discernment and skill in adaptation were most valuable. A great quantity of writing about India, and much of what has been done in India, is necessarily founded upon guess-work and half-knowledge, which accounts for much hazardous speculation in the departments of thought and action. Moreover, the Oriental contempt of qualified statements and of limitations, whether in

time or space, is apt to be contagious among all who have to do with Eastern law or literature; local characteristics are treated as universal; castes and creeds as immutable; the scanty data massed in this fashion are piled up into wide and lofty inductions. Sir Henry Maine's large and accurate intelligence enabled him to detect and point out these snares and delusions, which have more or less encompassed all previous English writers and politicians in their treatment of peculiarly Indian questions. To pass over earlier examples, I may suggest that if any one desires to measure, in literature, the difference between the generalisations of a man of literary talent and a man of genius, he should set Buckle's well-known demonstrations regarding Indian society and religions side by side with Maine's conclusions on the same matters; conclusions so cautiously stated, yet so full of life and fecundity. The former writer went wrong in premises and process, in his facts and his inferences; the latter makes each fact ring true before he passes it, analyses and classifies, draws his analogies with the prudence of Bishop Butler, and finally sets out the real import of the phenomenon under scrutiny in a manner that gives a firm foothold for further advance. A certain number of passages might be cited from his works that have perhaps done more to arrange and extend our ideas upon the past and present constitution of Indian societies than anything elsewhere written on the subject. He was probably the first writer who thoroughly perceived and explained the immense value of India as a living illustration of the ways and ideas of early civilisations. In his first work, upon *Ancient Law*, he referred to India as 'the great repository of verifiable phenomena of ancient usage and ancient juridical thought;' and he drew largely upon the Hindu Codes in support of his views. His residence of more than six years in India materially added to his exact information upon such curious and much misunderstood phenomena as are seen in communities by caste and by kinship; and in his later works the references to his ampler stores of Indian knowledge are numerous and important.

I think I am not wrong in supposing that Maine's Indian observations have added materially to the general science of jurisprudence. It is certain that as a statesman, no less than as a writer, he has left a lasting impression upon Anglo-Indian legislation, and upon the policy of our internal government of India. His books are read, as a matter of course, by all who study the more complex problems of Indian administration, for there is scarcely one of those problems which he has not at least touched, and by touching aided its solution. His large and tolerant temperament especially fitted him to deal with the prepossessions, inherited or acquired, not only

of the native Indian, but also of the active unscientific English spirit of rough and ready administration, and with the conservative notions of the formal English lawyer. He made allowance for all those social and professional prejudices which meet and conflict over Indian questions. In examining the distinction of races by manners, he notes 'the appreciable amount of sympathy that is quenched by the misuse of an aspirate;' and instead of denouncing the outlandish jargon of Anglo-Indian terms, as they often appear in official papers, he gently objects to 'the employment of phraseology too highly specialised.' He found himself in a country where for centuries political institutions had scarcely existed, and in which, for that very reason, the people had created for themselves a system of religious ordinances and social usage stronger than has been known elsewhere in the world. No better example could be found of the force with which the needs and risks of a primitive age can bind men together by spontaneous combination, for the purposes of social preservation and continuity. The despotic sovereign is there, but he neither makes nor enforces the laws which the people obey, and which change gradually with the varying conditions of their existence. The priest declares himself to be the sole legislator, infallible because he gives no reasons; but even his absolute commands rest on the hidden basis of utility; and one custom is built up on the ruins of another by the help of such temporary scaffoldings as fictions supply. In such a country as this Maine's office, as a jurist and legislator, was to guide and regulate the process by which the separate groups are very gradually dissolving into a population with some of the rudimentary characteristics of a great territorial nationality, under the pressure of a government that has introduced and enforces certain general principles of modern polity. The problem was, and is, to do this without abruptly breaking in upon personal laws or discarding traditional sanctions; remembering that mutability, not immutability, is of the nature and essence of primitive ordinances. The English government of India has of itself so profoundly affected the conditions of life and the habits of all Indians, that nothing but our own positive law could have prevented the old customs and rules of society from following these changes of the environment, so that we are doubly bound to take care that our legislation shall help instead of hindering the natural transformation produced by our presence in the country. Maine rendered valuable service to India by placing all these things in their true light, and by insisting on them in practical law-making and administration. His Minutes, and his speeches in the Legislative Council of India, deserve to be collected and re-

published as appendices illustrating his more elaborate works. On the Native Marriage Bill, for example, his speech is full of sagacity and keen argument. The object was to relieve from disability to contract a lawful marriage natives who might be dissenters from the recognised ritual of their caste and faith. In the natural state of Hindu society such dissenters, who have always been numerous, were excommunicated; that is, they could no longer eat or intermarry with their former brotherhood; and they then proceeded to form a fresh communion of their own, with full power to regulate their own internal economy. But the English law courts, which harden the old caste rules and have no power of creating new ones, recognised the excommunication but not the fresh communion, so that a dissident might and did find himself left outside all ascertainable laws of marriage. The Advocate-General declared the offspring of such persons to be illegitimate; the British law endorsed and very seriously enhanced the penalties of the Brahmanic ritual. In describing the causes and consequences of such a situation, in pointing out that we ourselves were stereotyping the movable rules and formulas of Hindu orthodoxy, in stating the proper position and duties of an impartial legislature bound to protect the civil rights of all sorts and conditions of men, in recalling the true history of civil marriage in Europe before the Church took charge of the contract, Maine's power of exposition and argument gave him an easy victory. He showed how the British law courts, precisely by reason of their tolerant principles, might operate so as to shut up, most intolerably, the natives of India in the cast-iron circles of a certain number of traditionary rituals, whereby institutions that had hitherto been subject to indefinite changes of outline would become rigorously defined and motionless. Upon this remarkable effect of the introduction of English law and procedure into India, he laid all the stress that its importance merits. 'Judging by experience,' he said, 'there are no limits to the influence which a clear and simple body of law exercises in absorbing less advanced systems;' and he explained over and over again how the law courts, instead of liberating Indian society, might be unintentionally led to tighten its bonds. Among unlettered folk reasonable usage is apt to degenerate into unreasonable usage; the ritual survives when the reason is forgotten or overlaid. But while this corrects itself in a self-regulating society, in the hands of the English Judge the rule gets fixed, and becomes really formidable. 'The capital fact in the mechanism of modern States is the energy of legislatures;' but in proportion as the Leviathan of English law, backed by irresistible sanctions, breaks up and devours the weaker indigenous species, the English legislator has continually to

reconstruct, reconcile anomalies, and repair disintegration. How far the influence of our law can extend is best known, perhaps, to those who have lived in the native States, beyond British jurisdiction, and who have detected certain semi-divine oracular personages privily appropriating a ruling of the Calcutta High Court. At a time when ordeals, oracles, omens, ingenious judgments like those of Daniel or Solomon, and all similar contrivances for deciding hard cases are being thus superseded, other tests of truth are urgently required, and a new fountain of civil obligation (to use Maine's image) must be opened. Here Maine was on his own ground, and pre-eminently qualified for the position in which he found himself. No scientific jurist ever had a finer opportunity of applying his principles to actual legislation; he stood at the opening of a new era, for modern India really dates from the ending of the great mutiny, and he had at his back Sir John Lawrence, the best Indian administrator of this generation.

Maine's manner of dealing with land legislation is marked by the same capacity for seeing things as they are, and opposing facts to preconceived opinions. He took a considerable share in some discussions of the highest importance regarding occupancy tenures in Oudh and the Punjab. Proprietary right, like religious belief, assumes innumerable forms in India, and mainly for the same reason, that in such matters the sovereign hardly ever interfered, but left things to their natural course so long as it did not affect his security or revenue. Now the English sovereignty, which undertakes to find a rule and a sanction upon all matters disputable, is obliged to interfere; and here again there has been a notorious tendency to build stiff theories upon vague and untrustworthy inferences. Maine's incisive analysis easily laid bare the illusory nature of the evidence upon which it was sometimes proposed to revise the existing land-holdings of a province. 'The land of India,' he said on one occasion, 'is the foundation of society, and it is asserted that once every fifteen or twenty years a number of gentlemen, many of whom it is not disrespectful to call young gentlemen, may go in and reconstruct the very basis of society.' Equally sharp and apposite were the weapons he used in combating men who picked out of Bentham doctrines for extreme application to India. Arguing upon the question whether litigation should be made to pay, by stamp fees, the expense of maintaining law courts, he said: 'Some people seemed to suppose that governments ought to be like Oriental monarchs, who first appropriated the greatest part of the property of their subjects and then, by way of compensation, sat in the gate and administered justice for nothing'—a system which, aided by bribery, has in fact always been most popular in Asia.

In short, among all these anomalies and conflicting notions, between those who used the law too rigorously, and those who thought an Anglo-Indian Judge needed no law at all, except the dictates of equity and good conscience; between the Hindu who would abate no jot or tittle of the sacred codes, and the Hindu who drew his will with the object of trying 'how far some of the most recondite feudal doctrines of English law could be imported into India,' Maine was always ready to clear and show the way, upsetting absurdities, disarming prejudices, and surmounting obstructions by the wider range and superior precision of his controversial weapons. One of his best-known axioms, that the tendency of society is from status to contract, has had much vogue and influence in India; though no one would have been less disposed than Sir Henry Maine to hurry on this process in India. It may be remarked that the policy of the latest land legislation has been rather to arrest than to expedite this tendency, by giving legal validity to status, and that in the general reaction that has recently set in against simple contractual relations may be traced a connection with the revival of the feeling of race distinctions, which seems to be yet destined to play a considerable part in the politics even of European nationalities.

During his term of office as legal member of the Governor-General's Council 209 Acts were passed, the great majority of which were drawn under his personal supervision, and all of which he considered and criticised. There was hardly a single branch of administration to which these measures did not relate. He also established the legislative department of the Indian Government, which has thenceforward drafted or superintended all projects of law throughout India. On his retirement from India, after more than six years' residence, Lord Mayo delivered in Council a very high encomium upon his services; and the representatives of all classes of the community joined in voting him cordial thanks, in attesting their sense of his conspicuous ability, and their deep regret at his departure. In the education of the people of India he had always taken a warm interest; his opinions in discussing the subject carried great weight, and his addresses during his three years' tenure of the Vice-Chancellorship of the Calcutta University will long be remembered. And Lord Mayo declared that 'in the Executive Council of the Empire Mr. Maine was always found a wise counsellor, an impartial adviser, and a minister of originality, sagacity, and resource.' His reputation stood equally high with successive Secretaries of State; nor can there be any doubt that his life was most valuable to India, and his death a grave misfortune.

A. C. LYALL.

II.

Sumner Maine était membre associé étranger de l'Institut de France, Académie des Sciences Morales et Politiques. Aussi au début de la séance de samedi 11 février, M. Bouillier, vice-président de cette Académie, en l'absence du président M. Fustel de Coulanges, s'est empressé de faire part à ses confrères de la mort de cet homme illustre. C'est, a-t-il dit, une perte irréparable pour l'Angleterre et pour la science. M. Fustel de Coulanges, retenu à Cannes par sa santé, a écrit à l'Académie pour la prévenir qu'il se propose, dès son retour, de lire une notice sur 'Cet homme sans égal dans la connaissance des sociétés primitives.' L'éloge sera d'autant plus intéressant qu'à plus d'une reprise, Sumner Maine a essayé de réfuter ce qu'il a appelé les *brillantes études* de M. Fustel de Coulanges sur la cité antique; il l'a d'ailleurs fait avec une courtoisie et une discrétion qui devraient servir d'exemple de bon goût à un grand nombre d'historiens. Sumner Maine a établi qu'on peut remonter beaucoup plus loin que ne l'a fait Fustel de Coulanges, et que certaines lois, considérées comme très anciennes, par exemple les lois de Manou, sont relativement récentes si on les compare à d'autres textes d'une haute antiquité. Les études de Sumner Maine sur les institutions primitives de l'humanité ont fait autant de bruit en France qu'en Angleterre. Les savants qui s'intéressent aux origines de l'humanité connaissent ses remarquables dissertations sur les livres sacrés de l'Inde, sur la famille primitive, sur les premières formes de la monarchie, sur la procédure dans les sociétés en voie de formation. Plus d'une théorie de Sumner Maine a sans doute rencontré parmi nous des contradicteurs, surtout celles qui touchent à l'histoire du droit français. On se demande si le savant seul a écrit les lignes qui prétendent justifier les revendications d'Edouard III à la couronne de France. Il est également surprenant que l'éminent auteur reproche aux juridictions royales et notamment aux parlements de n'avoir pas suffisamment écrasé les juridictions seigneuriales et les abus qui s'y rattachaient. Mais s'il est permis de discuter telles ou telles solutions de détail, on n'en doit pas moins reconnaître, en envisageant l'œuvre magistrale de Sumner Maine dans son ensemble, qu'elle émane d'un esprit de premier ordre, d'un savant d'une science sans limites et d'une pénétration tout à fait extraordinaire.

E. GLASSON.

III.

I should like to say a few words in commemoration of Sir Henry Maine. I was just about to bring him forward as a candidate for honorary membership in the Juridical Society of Berlin when I received the sad news of his premature death. Hence, I am in a position to state that, according to the general opinion of German lawyers, England has been deprived of a man who not only enjoyed European fame but was fully deserving of it.

Germany may perhaps boast of having for a long time been foremost in the historical investigation of the *Origines Juris Antiqui*. But in due modesty we have at the same time to acknowledge that our work was by necessity confined to the sources of Roman and ancient Teutonic law, or to the comparative study of medieval institutions.

Sir Henry Maine has opened and cleared a new field, undiscovered before him, for investigation into the affinities of the economical and jural condition of primitive society and its later survivals, as they are shown to have been in existence on a world-wide area lying between the eastern boundaries of the Ganges and the western shores of Ireland, between the Hindus and the Celts.

He has unveiled mysteries which before his publications had remained in the state of hieroglyphic language before Champollion. His interpretation was not drawn so much from literary remains and ancient documents as from the keen observation of facts and a strong imaginative perception of phenomena no more alive in modern society, but still capable of being presumed on sufficient grounds. He endowed this kind of presumption, in historical jurisprudence, with the power of claiming as much attention, and as justly, as circumstantial evidence does in a Court of Justice.

The great confederation of science and literature has to mourn the death of one of her best citizens.

FRANZ VON HOLTZENDORFF.

IV.

Le opere del Maine in Italia.

L'indirizzo storico nello studio del diritto e della società portò in questo secolo mirabili resultamenti in tutta l'Europa, e si rianodò in Italia alle tradizioni scientifiche che il Vico aveva così bene riassunto ed applicato. Le ricerche storiche sul diritto romano e su l'antico germanico furono in questi ultimi anni e sono ancora presso di noi la predilezione di illustri scienziati. Anche i nostri

filosofi hanno compreso che nella comparazione degli usi e delle norme di popoli antichi e di tempi passati stanno le basi per una seria *sociologia*. Ma a mostrare la via da tenersi per pervenire a considerazioni sociologiche col mezzo della storia ha immensamente contribuito il Maine, le opere del quale sono sempre più studiate ed ammirate da noi Italiani. E principalmente il suo celebre lavoro sopra l' *antico diritto* fu il primo a rendere comune ai nostri giuristi il desiderio di cogliere le leggi *sociologiche* nella storica *evoluzione* delle norme giuridiche. Questo connubio fra l'archeologia del diritto e la scienza sociale non è ancora compiuto, e non è ancora formata come disciplina a sé la *giurisprudenza comparata*, come la chiamava il Maine nel suo lavoro su le 'Village Communities' (1883): ma quando questa scienza sarà fatta grande e sicura ed avrà nelle università un suo proprio insegnamento, allora il Maine ne sarà considerato come uno dei più valenti fondatori.

La nostra celebre Accademia dei Lincei lo aveva nominato suo membro come segno della grande stima, nella quale il Maine era tenuto in Italia.

La morte di uno scienziato così illustre acuto e geniale ha addolorato tutti gli studiosi di Europa: ma la gloria del Maine e la nazione Inglese possono consolarsi nell' immortalità delle opere che egli lascia.

PIETRO COGLIOLO.

[On some future occasion I hope to say a few words, from my own point of view, of the work of my late friend and master. For the present it is enough to have brought together the concurrent and independent witness, first of one who has had almost unique means of seeing and judging Maine's Indian achievements, and then of representatives of the leading European schools of jurisprudence. I must be allowed, however, to assure my learned friend M. Glasson that very few Englishmen, if any, could at this day find enough patriotic interest in Edward III's interpretation of the Salic law to warm their discussion of it, or warp their conclusion, by any measurable fraction of a degree or a millimeter. I am sure, at any rate, that Sir Henry Maine did not.—EDITOR.]

THE STORY OF THE CHAIR OF PUBLIC LAW IN
THE UNIVERSITY OF EDINBURGH¹.

EVERY civilised man is a born story-teller. The present is a mere point of time, and in itself is not even a luminous point. Before we have well apprehended it, it has become the past, and it is by the light which the past sheds on it alone that we apprehend it consciously, and that it projects its light on the future. It is to the conscious recognition of this light from the past, and of the way by which it has led us hitherto, that we apply the epithet of civilisation. By means of it alone rational activity becomes possible. The man who lives in the present is a barbarian, whatever be the other conditions of his existence. To him his own life is unintelligible: a mere time-flake on the ocean of eternity; it brings him no inheritance and leaves him nothing to transmit. His activity is a succession of leaps in the dark. The stage of civilisation, moreover, stands almost always in a very close relation to the measure of historical knowledge; and it is marvellous with what rapidity families and nations and races that have ceased to be historical slip back into barbarism. When the footprints of preceding generations are obliterated, each new generation has to begin the work of ages afresh, and it is not surprising that it should often prove unequal to the task. When this task has been long neglected its performance becomes impossible to those on whose ancestors it was incumbent, and it is for this reason that the East must now look to the West for its own forgotten story.

As regards the individual, the sphere within which the duty suggested by these considerations is imposed is determined by his character and the circumstances of his life. The function of the historian, in any wide or general sense, does not lie at the door of the majority even of civilised men. Their duty is, by availing themselves of such gifts and opportunities as may be bestowed on them, to contribute material for a history that shall be creditable to their generation. But within certain limits, every father of a family is bound to be its historian. I do not say that it is his duty to become a genealogist and to trace all the ramifications by which he and his kindred are intertwined with other families, or to determine the extent to which their fortunes were affected by distant events. If his race was illustrious, that will be done for him by others; if it was obscure, he may be pardoned if he allows its earlier history and less immediate fortunes to be forgotten. But with the recent history of the family, its

¹ Professor Lorimer's introductory lecture, Session 1887-8.

history for the last three or four generations, we shall say, the case is different. That is, or ought to be, known to him as it can be known to no one else; and if he fails to transmit it he squanders the birthright of his posterity.

Now it appears to me that the holder of a public office stands to the public, to his patrons, and above all to his successors, very much in the position of the father of a family in this respect. If it is an ancient office he may leave its early history to the general historian. But its recent history, that history by which its present utility must be judged and its adaptation to the exigencies of the immediate future must be determined, is, or ought to be, known to him as it can be known to no other man. He may be prejudiced, it is true; but he cannot well be ignorant, and when he is entering on his twenty-sixth session, as is my case to-day, and on his seventieth year, as will be my case three days hence, it is scarcely likely that his vision should be greatly distorted by self-interest. On these grounds it appears desirable that I should now tell you the somewhat curious story of this chair, and give you some indication of my own experience as its occupant.

A Faculty of Law was included in the original scheme of each of the three older Universities of Scotland, and both at St. Andrews and Glasgow Canon and Civil Law were occasionally taught. Bishop Elphinston, by whom King's College in Aberdeen was founded in 1494, had himself been a professor of Canon Law at Paris, and of Civil Law at Orleans; and in his Statutes he enacted that the Canonists at Aberdeen should teach after the manner of Paris, and the Legists after the manner of Orleans. To him, too, is ascribed the suggestion of the enlightened statute of King James IV, 5. c. 54 (1494), which enacted that barons and freeholders should send their sons and heirs to the grammar schools, till 'they be competentlie founded and have perfite Latine, and thereafter to remain three years at the schules of art and jure, swa that they shall have knowledge and understanding of the laws.' In 1501 Elphinston further obtained an indulgence from the Pope, with the object of encouraging the study of civil law amongst ecclesiastics of all classes, with the curious exception of the Mendicant Friars.

The Reformers' scheme for remodelling the University of St. Andrews assigned to St. Salvador's College the privilege of granting degrees in law after one year's course in Ethics, Economics and Politics, and a four years' course under two readers in Municipal and Roman Law.

In Edinburgh the first serious effort to introduce the scientific teaching of jurisprudence appears to have been made by Reid, Bishop of Orkney, who, amongst his many offices and preferments,

was President of the Court of Session. Reid left a bequest for the endowment of a School of Arts and Jure, the object of which appears to have been to carry out the provisions of the statute just referred to. But, as in the case of another 'Reid-bequest'¹ that we know of, the founder's will was treated with scant respect. After tracing this discreditable transaction through its various stages, Sir Alexander Grant concludes his narrative thus: 'And so it came to pass that the only memorial of Bishop Reid's munificent purpose to endow a college "of Arts and Jure" in Edinburgh existed for some time (though it has long since passed away) in the name given to "fourteen little chambers" which formed part of the original College buildings, and which were called "the old Reid chambers".'

Another miscarriage took place when, in 1500, a professorship of laws was actually founded by the Lords of Session, the Town Council, the Advocates and the Writers to the Signet. Two professors were successively appointed to it, but for some mysterious reason they taught nothing but classical literature.

Subsequent to the foundation of the Court of Session it is probable that, in addition to the instruction by apprenticeship which must always have existed, instruction of a more scientific character, both in civil and municipal law, was given privately by members of the Bar. This however was less with a view to the completion of a legal education in Scotland than by way of preparation for the foreign study which long after the foundation of the University in 1582, and even after the Union in 1707—down indeed to the French Revolution—was considered indispensable for admission to the Bar. But slight and elementary as it no doubt was, I think we may assume with some confidence that the teaching of jurisprudence in Scotland even at this early period was not destitute of a scientific character. In addition to the care with which the connection between classical and legal studies was maintained, and the special provisions which we find for a philosophical and historical groundwork being laid in ethics, economics and politics, this assumption seems to be warranted by the preponderance of the ecclesiastical over the lay element on the Bench. It was by the canonists rather than the civilians that the study of the *jus naturale*, as a substantive branch of science, was carried on, and it was by them, as I shall show you hereafter, that its importance as the basis of the *jus inter gentes* was pointed out. Scotland was so entirely separated from the Roman Catholic world by the reformation as scarcely to have felt the influence of the Spanish School of Jurisprudence, which culminated in Suarez of Grenada, and to which the Protestant

¹ For the Music Chair.

² Grant, vol. i. p. 169.

writers who followed them owed more than they were willing to acknowledge. It is possible that the teaching of Alberico Gentile at Oxford may not have been wholly unheeded in Scotland; but though Gentile was a protestant he was not much of a philosopher, and it was to Grotius and his followers, unquestionably, and to the intimate relations which then subsisted between the intellectual life of Scotland and of Holland, that we were indebted for our introduction to the study both of scientific jurisprudence in general, or natural law as it was called, and of the law of nations. It was from this source that Lord Stair drew the inspiration which enabled him to bring science to bear on our municipal system with a definiteness of conception and clearness of expression which has never since been equalled by our text-writers; and it has always seemed to me probable that it may have been at Stair's suggestion that this particular chair, if not the Faculty of Law itself, was founded. Stair's great work was published in 1681 and he died in 1695, twelve years before the foundation of the Public Law chair; and there consequently can be little doubt as to the correctness of Sir Alexander Grant's conjecture that it was to the great Carstairs—'Cardinal Carstairs' as he was called—who was Principal of the University from 1704 to 1715, that we owe it more directly. Still it is worthy of remark that Stair went to Holland in 1682, and Carstairs returned to Holland after his secret mission to Scotland in 1685, and that they both remained in Holland till 1688 when they returned with the Prince of Orange. From 1685 to 1688 these two remarkable men were together, and in constant personal intercourse, in Holland. Both were philosophers, theologians, and politicians, and Stair could scarcely have failed to point out to Carstairs the relation between these subjects of common interest and his own specialty as a jurist; whilst Carstairs, who had studied at Utrecht, would be able to explain to Stair the arrangements by which this relation was recognised in the Dutch Universities. There was another Scottish exile of distinction in Holland at this time, who also formed one of the party that landed at Torbay, viz. Robert Dundas the second Lord Arniston; and it is interesting to reflect that during the long and stormy passage the three Scotsmen may have talked over the prospects of Scottish jurisprudence in the intervals between the political and ecclesiastical discussion which no doubt mainly occupied them. Dundas was not a man of the same intellectual calibre as Stair or Carstairs, but he was a man of cultivated and scholarly tastes; and as he lived till 1729, his Dutch experiences may have enabled him to aid Carstairs with his counsels.

But from whatever direction the influences may have come which led

to the formation of the Faculty of Law, we are not left to conjecture as to the School of Jurisprudence of which this particular chair was an offshoot. One of the students in this class found in an old book-stall, and kindly brought to me, the curious little book which Sir Alexander Grant has described in a note¹. It is a compendium of Grotius's *De Jure Belli et Pacis*, by William Scott, who was one of the regents at the time. It is dedicated to the Lord Provost and Town Council, and on the copy in the library is written *ex dono Authoris, 4^{to} Aprilis, 1707*. 'In a Latin preface Scott tells us that the book had been printed for the use of a private class, to whom he had previously dictated its contents as a preparation for wider studies, and he gives in full his opening address delivered in his private class-room (*in auditorio privato*) on the study of Grotius. This shows,' Sir Alexander continues, 'that there was some little demand among the students of the college for lectures on the Law of Nature and Nations. It is possible that Carstairs may have suggested the delivery of these lectures, as a first step towards the foundation of a chair. But under the circumstances it is remarkable that the chair when founded should have been given to Areskine and not to Scott.' The coincidence between the date of the publication of Scott's book and the foundation of the chair, 1707, may be taken, I think, as indicating that Scott was a candidate for it. Its dedication to the Town Council seems to show that it was on their influence that he relied; and their leaning in his favour may have had something to do with the bitterness with which they resented what they regarded as the high-handed action of the Crown in placing Areskine in the University without their consent.

From all these circumstances, I think, you will not doubt that when this chair was ultimately founded in 1707 its object, as Sir Alexander Grant has said, was to provide 'a scientific and philosophical basis for a future Faculty of Laws, in imitation perhaps of the Dutch Universities².' The School of Grotius was that which was then uppermost in the minds of Scotsmen, and the Faculty of Law from the first was manifestly intended to cover the whole field of Jurisprudence and to embrace legislation as well as jurisdiction.

1. Its first occupant was CHARLES ARESKINE, or Erskine, of Tinwald, 1707-1734. He came of a race, or rather I ought to say of races, which had been distinguished in the law long before him and continued to be so long after him. 'His grandfather, the Honourable Sir Charles Erskine of Alva, fourth son of John Earl of Mar and of Lady Marie Stewart, daughter of the Duke of Lennox, married Mary Hope, second daughter of Lord Advocate Sir Thomas

¹ Vol. i. p. 233.

² *Ibid.*

Hope. Of this marriage was born Sir John Erskine of Alva, father of the Professor. His mother was Christian, daughter of Sir James Dundas of Arniston. Erskine is said to have studied for the Church; but he soon abandoned the idea of taking orders. When only twenty he was appointed one of the Regents of the University of Edinburgh. He held this office, in which he taught Logic, Ethics, Metaphysics, and Natural Philosophy, until 1707, when he was made Professor of Public Law¹. It is not quite fair to say, as Sir Alexander Grant has done, that there is no indication of his having taught except 'a brief inaugural address, written in Latin, upon God as the fountain of Law².' Mr. Omond, in a note, gives the following advertisement from the Scots Courant of 12th to 14th November, 1711: 'Mr. Charles Erskine, her Majesty's Professor of Public Law in the University of Edinburgh, designs to begin his private Lectures on the Laws of Nature and Nations, on Friday next at 5 o'clock in the afternoon, at his lodgings in Fraser's Land³.' What came of this pious design I cannot tell, but I fear it must be admitted that Erskine was not a very zealous professor. Immediately after his appointment he went to Utrecht to study law. This may have been in order to prepare for the duties of his chair, as well as with the view of his admission to the Bar; and his being abroad during the Jacobite rising in 1715, in which several of his kindred came to grief, was a proof of his political discretion, and no disproof of his professorial zeal. His subsequent travels with his brother Robert, physician to Peter the Great, when he wrote to his wife that 'she must be thinking he had taken service with the Czar of Muscovy,' may have been very instructive to him as an international jurist. But any aspirations after distinction in that capacity which he may originally have cherished were speedily extinguished by the temptations held out to him by his professional success and the Court-favours which he owed to his family connections, and still more to the patronage of the great Duke of Argyll. His reluctance to sever himself from an office which brought him in contact with the philosophical studies of his youth may probably have been the cause of his continuing to hold the chair for the long period of twenty-seven years. But how incompatible the discharge of its duties must have been with his other avocations will be seen from Mr. Omond's narrative of his subsequent career. He was called to the Bar on the 14th of July, 1711. In 1714 he was an Advocate Depute. He became one of the leaders of the Bar; purchased the estate of Tinwald in Dumfriesshire; and in April, 1722, was returned to Parliament as member for that county.

¹ Omond's *Lord Advocates of Scotland*, vol. ii. p. 1.

² Grant, vol. ii. p. 314.

³ *The Lord Advocates of Scotland*, vol. ii. p. 1.

In May, 1725, when Forbes became Lord Advocate, Erskine was appointed Solicitor-General. On this occasion he received a special mark of royal favour. Hitherto the only Counsel allowed to be placed within the bar had been the Lord Advocate; but on this occasion a change was made. The new Solicitor-General presented to the Court a warrant under the sign-manual, subscribed by the Secretary of State for Scotland, in these terms: 'Whereas we have appointed Mr. Charles Areskine, advocate, to be sole Solicitor for that part of Great Britain called Scotland, and we being pleased to show him a further mark of our royal favour, it is our will and pleasure that a seat be placed for him within the bar of your Court, where and from whence he may be at liberty to plead cases in your presence; and we do hereby direct you to cause such to be placed accordingly.' At the general elections of 1727 and 1734 he was returned for Dumfriesshire. In 1737 he succeeded Forbes as Lord Advocate, and strenuously supported the Scottish policy of the Walpole ministry till 1741. At the general election of that year Sir John Douglas of Kelhead became member for Dumfriesshire; and Lord Advocate Erskine was returned for the Sutherlandshire district of burghs. His election was, however, declared void in the following year, and he resigned office. His successor was Robert Craigie of Glendoick, to whom he wrote the following pleasant letter of congratulation: 'It's commonly believed we love our heirs but not our successors, and sometimes we don't our heirs because they are to be our successors. However this is not the case with me; you have been mentioned to the King by the Marquis of Tweeddale as my successor, and I heartily agree to it, and wish you success and prosperity in the office. You are happy in having to do with a patron who is a man of truth and honour, and this is a great encouragement to you. To show I'm sincere in all this. I have used my best endeavours you should be elected in my room, the election being found void.' 'He returned to practise at the bar; but there was a vacancy on the bench in November, 1744. and he received the appointment. Four years later he succeeded Fletcher of Milton as Lord-Justice-Clerk; and died, after filling that post to the satisfaction of the country, in April, 1763¹. 'As a lawyer,' says Mr. Fraser Tytler², 'he was esteemed an able civilian. He spoke with ease and gracefulness, and in a dialect which was purer than that of most of his contemporaries: as a judge his demeanour was grave and decorous, and accompanied with a gentleness and suavity of manners that were extremely ingratiating.'

¹ The Lord Advocates of Scotland, vol. ii. p. 1 et seq.

² Life of Lord Kames, p. 38.

2. WILLIAM KIRKPATRICK, 1734-5. Areskine was succeeded by his son-in-law, William Kirkpatrick, third son of Sir T. Kirkpatrick, second baronet of Closeburn. He sat in Parliament for the Dumfries Burghs from 1725 to 1747. In the latter year the Duke of Queensberry received compensation for his heritable Sheriffship and William Kirkpatrick was appointed to the office. He died in 1777. He married Jean, third daughter of his predecessor. It is thus obvious that the chair was vacated by Areskine in his son-in-law's behalf when he himself was Solicitor-General and when that son-in-law was Sheriff of Dumfriesshire and member for the Burghs. Mr. Kirkpatrick's son took the name of Sharpe on succeeding to the Hoddam estates, and was the well-known wit and antiquarian Charles Kirkpatrick Sharpe. William Kirkpatrick held the chair only for one year, and I grieve to say the solitary fact connected with his tenure of it that has come down to us is that he sold it to his successor for £1000. How nobly one of his descendants is atoning for the academical shortcomings of his ancestor I need not tell you¹.

3. GEORGE ABERCROMBY, OF TULLIEDODY (1735-1759), was a country gentleman of good family. He was born in 1705, and died in 1800, within a few weeks of the completion of his 95th year. He was the father of General Sir Ralph Abercromby, and the grandfather of Lord Dunfermline, and he is represented by the present Lord Abercromby. Like his father he was called to the Bar, and they both lived to become its oldest members; but he never practised. Of his professorial career of fifteen years we know very little. Lord Dunfermline, in his *Life of Sir Ralph*, says that 'during several sessions Mr. Abercromby gave lectures in the University on the Law of Nature and Nations,' and Sir Alexander Grant says that in 1741 he was lecturing on Grotius. How long he lectured we do not know. His grandson says he was 'distinguished for his industry, his love of knowledge, and his vigorous and comprehensive understanding.' Notwithstanding these good qualities, however, he probably did not succeed as a lecturer. Scotch students are apt to become impatient of a professor who condescends to mere tutorial work, and, if Abercromby had nothing of his own to tell them, it is not surprising that they should have tired of his prelections on Grotius. In 1750 he made over the chair to his son-in-law, Robert Bruce; whether for a pecuniary consideration or not does not appear.

4. ROBERT BRUCE, OF KENNET, 1759-1764. Of Mr. Bruce as a professor we know nothing. He held the chair for only five years, and

¹ John Kirkpatrick, Professor of Constitutional Law and History.

was raised to the bench by the title of Lord Kennet. He was great-grandfather of the present Lord Balfour of Burleigh. Whether he lectured or not I have been unable to discover, but as he is said to have had the character of being an unusually pure, painstaking, and conscientious judge, at a time when these qualities were not so common as they are now, it is scarcely probable that he held an office the duties of which he made no effort to perform. He died in 1785.

5. JAMES BALFOUR, OF PILRIG, 1764-1779. He too was a country gentleman, and lived in the fine old castellated house, between Edinburgh and Leith, which we all know. Nor has his shadow in this respect grown less, for though his representatives have not, like those of his two immediate predecessors, reached the peerage, they have retained their position, and have recently had a large accession to their fortune. But Balfour was more than a Scotch laird; he was a Scotch philosopher; and if any Scottish Raphael should paint us a picture of the School of Modern Athens, his figure would appear in the background, behind the grander images of Stewart and Ferguson and Hamilton and Hume. In his relations with the latter his name crops up in all the histories, and if I were dealing with the chair of Moral Philosophy, which he held from 1754 to 1764, I should have a good deal to say of him, in connection both with Hume and with Lord Kames. As Professor of Moral Philosophy Sir Alexander regards him as having been simply a failure, and his removal to the chair of Public Law in order to make way for Adam Ferguson—an arrangement which was effected by one of those scandalous transactions of buying and selling of which there were so many instances—must have been a prodigious gain to the University. But though 'there seems little reason to doubt that Balfour was not a brilliant professor'¹ nor a brilliant man, his contemporaries spoke of him with far greater respect than the anonymous writer in the *European Magazine* in 1783, from whom Sir Alexander's conception of his character seems to have been chiefly derived. In speaking of his criticisms of Lord Kames's views on liberty and necessity, Mr. Fraser Tytler says: 'It is with pleasure we remark that the author of "Philosophical Essays" has afforded an example of a candid, liberal, and truly philosophic spirit of enquiry.'² 'Mr. Balfour was likewise the author of *A Delineation of Morality*, and a small volume entitled *Philosophical Dissertations*. The principal object of these works is an examination of the doctrines contained in David Hume's *Essay on Human Nature*, and his *Inquiry concerning the Principles of Morals*. The strongest testimony to the merits of Mr. Balfour is that of

¹ Grant, vol. ii. p. 338.

² *Life and Writings of Lord Kames*, vol. i. p. 141.

Mr. Hume himself.' Mr. Tytler here refers to a curious letter from Hume to Balfour, the studied urbanity of which however, as it seems to me, only partially hides a vein of sarcasm more characteristic of the writer than complimentary to the recipient.

Balfour was no match for Hume, and his writings possess no absolute or permanent value. But whatever were his other qualities, his industry, at all events, must have been considerable, for during almost the whole of the ten years that he held the chair of Moral Philosophy, from 1755 to 1761 he also acted as Sheriff-Substitute of Edinburgh. Even so late as 1764, the year in which he was transferred to the chair of Public Law, traces of him are to be found in the Diet Books of the Sheriff's Court¹.

It is singular that the resignation of his judicial office should apparently have been co-incident with his transference from the Faculty of Arts to the Faculty of Law in the University, and it is disappointing to find no proofs of his activity as a jurist, either academical or scientific. The author of the notice of him in Stephen's 'National Biography,' who is I believe a connection of the family, makes no mention of his having lectured on Public Law at all, though he adds two facts of some interest to what was otherwise known of him, namely, that he studied at Leyden, and that his mother was a grand-aunt of Sir William Hamilton. But not much of the genius of that great man can be claimed for him, and I fear we must be contented to sum up his character with Mr. Fraser Tytler's statement that he was 'an ingenious, modest and worthy man, who spent a long life in the practice of those virtues which it was the object of his writings to inculcate'².

6. ALLAN MACONCHIE, OF MEADOWBANK, 1779-1796. With the possible exception of Areskine, Maconochie was the ablest man who ever filled the chair, and he is the only one to whom posterity gives credit for having lectured with success, even for a time. Lord Cockburn, who knew him only in later life, was estranged and bewildered by the metaphysical turn of his mind, and is a somewhat unwilling witness in his favour. He does not mention him as a professor at all, and, even as a judge, does not speak of him in terms of such enthusiastic admiration as Lord Brougham and Lord Jeffrey. Still the sketch of his intellectual character he has given us shows how exceptional must have been his qualifications for an academical appointment, and, above all, for the academical appointment which he held.

'His peculiar delight and his peculiar power,' Cockburn says, 'was in speculation; chiefly as applied to the theoretical history of

¹ Letter from Sheriff Rutherford, 5th October, 1887.

² Life of Lord Kames, vol. i. p. 140.

man and of nations. He acquired great skill in the use of his metaphysical power, both as a sword and as a shield, in the intellectual contests in which it was his delight to be always engaged. He questioned everything; he demonstrated everything; his whole life was a discussion. This, though sometimes oppressive, was generally very diverting, and gave him a great facility in detecting and inventing principles, and in tracing them to their sources and to their consequences. Jeffrey described this very well when he said that while the other judges gave the tree a tug, one on this side and one on that, Meadowbank not only tore it up by the roots, but gave it a shake which dispersed the earth and exposed the whole fibres¹.

How long Maconochie taught it is difficult to determine. Bower, who is confirmed by other authorities, says he lectured only for two sessions, owing to the extensive increase of his practice at the Bar. But it seems scarcely likely that he abandoned a task which must have had great attractions for him, and for which he had taken the trouble to prepare a course of lectures, on so short a trial. He knew, indeed, but too well, that he could hold the chair as a sinecure, and could thus reimburse himself for the £1532 18s. 2d. which was the sum he paid for it to Balfour. But he can scarcely have been the man his contemporaries took him for, if, at such a period of history as the seventeen years of his tenure of the chair covered, he was willing to exchange the interests of science and of mankind for those of his clients in the Parliament House, even with the ultimate temptation of a seat on the Bench. We are told that he did not succeed in attracting a class, and this Lord Jeffrey ascribed to the unintelligible or, at all events, unteachable nature of the subject—a subject which, with all his brilliancy, I fear neither Lord Jeffrey himself nor the Commissioners to whom he addressed his observations understood. ‘Mr., afterwards Lord Jeffrey,’ says Sir Alexander Grant, ‘told the Commissioners of 1826 in reference to the Chair of the Law of Nature and Nations, “It was taught by a succession of able persons in this University, among others by the late Lord Meadowbank, than whom no man was more full of discursive knowledge and originality; yet in his hands, as well as in those of his successors, it proved in practice a complete failure, so that they could hardly get through the course with a larger attendance than is now round the table of the Commissioners”².’

Had Lord Stair been in Lord Jeffrey's place he would have given a very different account of the affair. Bringing his own philosophical instincts and his acquaintance with foreign schools of learning

¹ Cockburn's Works, vol. ii. p. 124.

² Grant, vol. ii. p. 316.

to bear on it, he would have told the Commissioners that the conditions on which the experiment had been tried in the University of Edinburgh were not such as to render success possible. The subject, which he regarded as the very root of jurisprudence on which Carstairs designed that the Faculty of Law should be based, had never been recognised even as a branch of any organised system of legal teaching whatever. Its study was not imposed as a condition for admission to the Bar; still less, of course, to the other branches of the profession. Shallow and thoughtless witlings, led astray by Rousseau and his followers, made stupid jokes about the *jus naturale*, the meaning of which they ought to have learned from the Roman jurists whom they pretended to have studied, and the chair was openly bought and sold with the consent of the Lord Advocate and the Town Council. Maconochie thus fell on a thankless and unappreciative, though an admiring generation, and the spirit of the age, against which he was not strong enough to struggle, had probably more to do with his failure than either the intrinsic character of his subject or his own hungering after the loaves and fishes of the Parliament House. Had half the salary which he received as a judge been offered to him as a professor, had he been consulted by Government on questions of International Law, or occasionally employed as a jural assessor in the negotiation of a treaty, as is the custom on the Continent, and had the ultimate prospect of such honours as are now conferred on physicians and physicists and philanthropists been held out to him, he might have remained in the University all his days, and left a name in Scientific Jurisprudence as cherished in Scotland as that of Stair himself, and far more widely known. But let us not dwell regretfully on might-have-beens that were not to be. By preventing as a judge the candle of principle from being hid under the bushel of precedent in the Parliament House, Maconochie did good service in his day, and his judgments still enjoy professional consideration. But as a teacher of science, all that remains of him is the following sketch of his course in Hugo Arnot's History of Edinburgh:

‘Mr. Maconochie destines his course for gentlemen who have nearly completed their education at the University, on the most liberal plan. He traces the rise of political institutions from the natural characters and situation of the human species; follows their progress through the rude periods of society; and treats of their history and merits, as exhibited in the principal nations of ancient and modern times, which he examines separately, classing them according to those general causes to which he attributes the principal varieties in the forms, genius and revolutions of governments. In this manner he endeavours to construct the science of

the spirit of laws on a connected view of what may be called the natural history of man as a political agent; and he accordingly concludes his course with treating of the general principles of municipal law, political economy, and the law of nations¹.

We may here, I think, find traces of Montesquieu, and, apart from the influence which his frequent residences in France must have had upon him, it is not wonderful that Montesquieu's teaching should have been supplanting that of Grotius in his mind, when we consider that Europe had just been flooded with twenty-two editions of the *Esprit des Loix* in eighteen months after its publication. The lectures, I believe, are in the possession of the Meadowbank family, and it seems worthy of consideration whether they ought not still to be given to the world. Their intrinsic value may have been lessened by time, but they could scarcely fail to be important contributions to the history of opinion. Like the other celebrities of his time, Maconochie appears in Kay's Portraits. His physiognomy is grave and thoughtful, and one can well imagine must have been felt as somewhat 'oppressive' by so gay a spirit as Cockburn's. Kay has also a pretty elaborate notice of him, and it is interesting to us to know that he was one of the founders of the Speculative Society, to which many of us owe so much. On being raised to the Bench he took the title of his estate, as is the custom in Scotland, and was the first Lord Meadowbank, his son Alexander, in accordance with the well-known jest, having been Lord Meadowbank 'also, but not like-wise.'

7. ROBERT HAMILTON, 1796-1832. Though Lord Jeffrey spoke of Maconochie's successors he can scarcely be said to have had a successor at all; for Mr. Hamilton neither taught, nor, apparently, was expected to teach. The Bishop's teinds on which the chair depended for its endowment having been mostly carried off by augmentations to the stipends of the ministers in the parishes on which they were allocated, an annuity of £200 a year was granted him from the Consolidated Fund. But this did not bring the salary up to its original value, and Hamilton was permitted to hold the chair as an acknowledged sinecure for the rest of his days. On his death in 1832 no new appointment was made, and thus the chair from which it was intended that the Faculty of Law should take its tone, and by means of which it was expected that it would assert its place in the scientific world, was consigned for the next thirty years to the lumber-room of the University. There is no reason to suppose that where Maconochie failed Hamilton could have succeeded, but under more favourable conditions success, even in his

¹ Arnot's *Edinburgh*, p. 305.

case, does not seem to have been impossible. He is said to have been a considerable antiquarian, and, along with his friend Sir Walter Scott, was one of the principal Clerks of Session. I believe he was a Hamilton of Gilberseleugh and was connected with the Belhaven family.

Such then, gentlemen, is a brief and imperfect sketch of the fortunes of this chair and of the characters of its occupants. They were all men of ability who succeeded in other and, to them, more tempting careers. Three of them, as we have seen, became judges of the Court of Session, and one of these rose to the dignity of Lord Justice Clerk. Two, if not more, were members of Parliament. They were all cultivated gentlemen, two having had the special qualification of having previously been Professors of Moral Philosophy. Lastly,—what was an element of success of greater value in their day than in ours,—they were all men of family, and two of them are now represented by peers.

Strange as was the method of their appointment, moreover, there was not one bad appointment amongst the whole of them. There was not one of them who, under other conditions, might not have made a creditable professor, and there were two of them who, had they persevered, there is every reason to believe would have distinguished themselves as philosophical and international jurists. But they did not persevere, no one persevered, no one succeeded, and the consequence was that when I was appointed, in 1862, I had neither precedents nor traditions to guide me.

Nor was this defect supplied by the instructions which I received. The Ordinance of the Commissioners, it is true, was simple and intelligible. All that I was called upon to do was to deliver forty lectures on International Law during the Winter Session. For this light task the not inadequate remuneration of a salary of £250, together with such fees as I might be able to gather, was assigned to me. But, on the other hand, by the commission which was issued to me by the Crown, I was appointed 'Professor of Public Law and of the Law of Nature and Nations,'—the old title of the chair, after mature deliberation, I was told, having been, wisely as it seemed to me, retained. No less than four branches of the science of Jurisprudence of great importance, each of which in fully equipped Faculties of Law is represented by a separate course,—viz. (1) Public Law, the *Jus Publicum* of the Romans, the *Staatsrecht* of the Germans, what we loosely call Constitutional Law; (2) Natural Law, the *Jus Naturale*, the Philosophy of Law, or Jurisprudence in its general and more strictly scientific sense; (3) the Public Law of Nations, *Jus inter Gentes*; and (4) Private International Law, the *Jus Gentium*,—were thus handed over to me.

Of the first, which had given its name to the chair, Public Law, I felt at once that I was relieved by the institution of a Professorship of Constitutional Law and History; and, though in some aspects it had hitherto been my favourite study, I consigned it, except in so far as it might be necessary to go into it for international purposes, without reluctance to my eminent colleague Professor Cosmo Innes. But there still remained the Philosophy of Law and the Public and the Private Law of Nations.

Many esteemed friends in the Parliament House recommended me to confine myself to the latter subject, as that which was of the greatest practical importance and most likely to attract a class. Against this temptation I at once closed my ears. I was deeply impressed with the importance of the Philosophy of Law as the foundation of Jurisprudence in all its branches. I had already made preparations for a treatise which I had intended to publish on the subject, and now that I had become its academical representative I was resolved to teach it, better or worse, as ability might be granted me. This resolve was strengthened by the further consideration that the two branches of Positive Law I was subsequently to teach rested on it in a special sense, and that the founders of the chair, under the guidance of Carstairs, had adhered to what might be called the tradition of the Fathers, and had coupled the Law of Nations with the Law of Nature.

But how was all this to be accomplished? That I should dispose of three such subjects in forty lectures, with such a measure of completeness as to give any real academical value to my teaching, was plainly impossible. The only course left open to me was that, with the consent of the *Senatus*, I should abandon the easy lines which the Commissioners had traced for me, and accept the burden of a regular winter course of five days a week. Permission to adopt this arrangement was readily granted me, on condition that my fee, £3 3s., should not be increased; and I must, consequently, have delivered about a thousand gratis lectures. I mention this latter fact, not for the purpose of enhancing the value of my own services, which may or may not have been increased by the larger space over which I found it necessary to extend them, but in order to indicate the amount of labour which will fall to my successor should he feel himself under a similar necessity, and which he may not be willing to perform on the same conditions. In my own case the sacrifice involved in the exclusive devotion of my time and energies to the duties of the chair was not considerable. The occupation was the most attractive one that could possibly have been assigned to me, and, if the pecuniary remuneration was scanty, my ambition was stimulated by the reflection that the position opened avenues to a

wider and perhaps more permanent reputation than any other within the range of the profession. Though not without much anxiety and many misgivings, I consequently entered with zeal and hope on what was to so great an extent a self-imposed task, and to the pride and pleasure which I have all along felt in its discharge I ascribe the comparative success which has attended my efforts. In the hands of my far abler predecessors it was a secondary occupation, which they took up or laid down as the exigencies of practice rendered possible or convenient, and to this circumstance, as I have said, far more than to either the unattractiveness of the subject or their inability to teach it, is, in my opinion, to be ascribed their failure to obtain for it a permanent place in the University and the recognition of the profession. It is to be remembered, moreover, that attendance on the class in their time was wholly voluntary, whereas on my appointment it was made compulsory for the LL.B. degree, and in 1886 was imposed by the Faculty of Advocates on all entrants to the Bar.

Notwithstanding the gloomy forebodings of my professional friends, the philosophical portion of the course proved from the first to be the most attractive to the students. Students of theology and others frequently came solely on account of it; the attendance on it was always more regular than on the other branches, and in it the best examination papers and the best essays were written. The reason of this I believe to have been that, in addition to the naturally thoughtful and earnest character of Scotsmen, our Scottish students are specially well prepared for this branch of study by the excellent training in Logic and Ethics which they receive in our Faculties of Arts. In this respect it has always appeared to me that our M.A.s contrast favourably with English graduates, and I regard it as a reason why we should be very careful in interfering with the curriculum for our Arts degree. As a preliminary to the degree of LL.B., at all events, I am decidedly of opinion that no Arts degree from any University ought to be accepted which does not embrace Logic and Ethics. In these, as in other branches of knowledge, men of brilliant ability and of exceptional industry will, no doubt, supply the defects of their early education; but, as regards the majority of students, it is simply impossible to teach them scientific jurisprudence unless they bring a reasonable acquaintance with these ancillary subjects along with them. The students who attend the class of Public Law, having for the most part already graduated in Arts, and all of them being grown men, I have always treated them as friends and fellow-workers, and no words could be too strong to express the consideration and courtesy with which they have invariably behaved to me.

In dealing with the chair in future, two courses manifestly suggest themselves for consideration. Either it may be retained substantially on its present footing as a single chair, or it may be broken up into two or three separate chairs or lectureships, as in the Continental Universities. In favour of the first course there is perhaps most to be said. Premature specialising is the curse of our present academical life, and as few students would be willing to attend additional lectures, unless the whole subject were presented to them in a single course, there would be great risk of their becoming imperfect and onesided specialists in one or other of its branches, before they had got a grasp of the general principles which govern them all. There is, of course, no theoretical obstacle that stands in the way even of Private International Law, which is the narrowest of the three branches, being taught in such a manner as that an absolute basis should be given to each doctrine, and science made to shine through it at every step. But, practically, we know that this would not be done, and that, if it were done, it probably would not be intelligible to those who had made no previous study of Jurisprudence as a whole. The same remarks apply to the Public Law of Nations with even greater force, because its rules are less definite, and from the want of any central authority by which they can be enforced, it leans even for its executive factor on the Law of Nature.

The most perfect arrangement, no doubt, would be that the present chair, embracing the three subjects in a single course, should be retained for purposes of general instruction, attendance on it being imperative for the LL.B. degree, and for the Bar, as at present, and extended to Writers to the Signet, a good many of whose apprentices have been voluntary students in recent years; and that, alongside of it, there should be established three separate courses, one on each of the three subjects, on which attendance should be voluntary. But such a scheme is far too ambitious for this country, and as regards the Philosophy of Law and the Public Law of Nations, at all events, we may at once dismiss the notion of their being established with such endowments as to induce men of ability to accept them, whilst at the same time the present chair is maintained.

The endowment of a lectureship on Private International Law, on the other hand, appears to me to be by no means an impracticable scheme. As it need not interfere with the professional prospects of the lecturer, it might be held by a succession of junior members of the Bar; and as it would demand no special gifts or acquirements which could not be turned to practical account, an endowment of £150 or £200 a year would probably be sufficient.

To the attempt to introduce separate courses of the Philosophy of Law and of the Public Law of Nations there are other objections, in addition to the financial one I have mentioned. A course devoted exclusively to the Philosophy of Law would, probably, drift away into those abstract and subtle metaphysical speculations the bearing of which on Positive Law is of too indefinite and disputed a kind to render them acceptable in this country, and which even in Germany, in recent years, have almost banished the subject from the academical arena. As regards the Public Law of Nations, a separate course, occupied as it must be in a great measure with the history of treaties and with the details of diplomatic arrangements, would be wholly useless except in conjunction with a school of diplomacy, the establishment of which in Edinburgh would be a matter of great if not insuperable difficulty.

For these and other reasons—amongst which I would mention the unsettling effect of all changes and the difficulty with which new institutions are established—it humbly appears to me that the wisest course would be to retain the existing chair very much on its present footing. Even if a lectureship on Private International Law were established, I would not relieve the Professor from the duty of teaching that subject, because, as Professor of Jurisprudence, it would belong to him to determine its scientific character, and, as Professor of International Law, to assign to it its place as a subsidiary doctrine to the fundamental doctrine of recognition.

But, if the present chair is to be retained with any reasonable guarantee for its permanent success, I have one word to say about it which I could not have said with equal freedom twenty years ago—it *must be better endowed*. No one can feel more keenly—few probably even of my many gifted pupils ever felt so keenly as I have all along done myself—how much was lacking to me in the qualifications demanded by the position which I occupied. I am very far from insinuating that my poor services have not been adequately remunerated, or that I had personally the slightest claim to the honour and consideration with which Continental nations and the Americans are in the habit of treating their international jurists. But I know the position, I know the high and rare qualities which its occupant ought to possess, and I say without hesitation that no succession of men possessed of these qualities can be secured and retained on the conditions on which it has been held by me, still less on those on which it was held by my predecessors. Sir A. Grant has said of it that 'it could only have been made attractive to the students by a man of genius who devoted himself to expounding the Philosophy of Law. Whereas the chair

has been held by a succession of advocates who were engaged in successfully pushing their way to the Scottish Bench, and who naturally treated their academical position and duties as of minor importance. It is no wonder then that the chair was a failure¹.

A succession of men of genius can never be secured for any office. No chair in the University ever had that advantage, and it may be that no man of genius ever occupied the chair of Public Law at all, though, in the opinion of his contemporaries, Maconochie, as we have seen, came very near to that character. Of Areskine, its first occupant, we know less, but it is hard to believe that a man who was a Regent of Philosophy at twenty-four, who seven years after chose as the subject of his inaugural address 'God as the Fountain of Law,' and who ended his brilliant professional career by rising to the second highest place on the judicial bench, was deficient either in the philosophical gifts or the energy of character requisite to have made him not only an efficient professor but a distinguished scientific jurist, had the inducement been sufficient. To both of these men the world-wide reputation and permanent fame enjoyed by men like Grotius, or even by such lesser lights as Alberico Gentile, Puffendorff, or Vattel, must have had their charm. But the charm was not sufficient to compensate for the sacrifice of wealth and local consideration which it involved; and unless some means are adopted to diminish this sacrifice in future, no succession of able professors need be looked for, and Scotland can never take the place in scientific jurisprudence which belongs to her in virtue of the thoughtful and speculative genius of her people.

The claim for more liberal endowments and more generous recognition of this particular chair is strengthened by another consideration with which I shall conclude these remarks, which have already run to a greater length than I contemplated. General Jurisprudence and International Law are branches of science which must draw their nourishment almost exclusively from Continental sources. The professor of International Law must be himself an internationalist. He must not only know foreign languages and read foreign books, but he must know foreigners and foreign nations, otherwise he will see everything through the distorting medium of local feelings and prejudices. If he is an enthusiast in his science, moreover, it is to his Continental colleagues that he must look for sympathy and companionship, and for escape from the intellectual isolation to which, for the present at all events, he will be here condemned. Having received a portion of my own education abroad I had some advantages in these respects, and yet there is nothing I regret more than not having spent my holidays on the Continent.

¹ Vol. ii p. 316.

during the earlier years of my tenure of the chair, and gone into academical and political society abroad to a greater extent than I did. When my Continental colleagues did me the honour of inviting me to take part in founding the Institute of International Law in 1873, a large increase took place in my Continental acquaintance, and this has led to much charming intercourse, both social and scientific. But I was by that time too far advanced in life, and my health was too shattered, to admit of my availing myself fully of the privileges they offered me. I have only been present at three meetings of the Institute, and have taken little part in its labours. Through its means, however, I have been brought into contact with all the leading international jurists of the day; and I am convinced that nothing is more important for a Professor of the Law of Nature and Nations, be the sphere of his local activity what it may, than a constant interchange of publications and letters, and of occasional visits with the class of men who constitute the Members of the Institute. With a view to this, however, he ought to be in such circumstances as to render the expenses of his journeys and the immediate remuneration he may receive for his publications a matter of comparative indifference, and to enable him to return the hospitalities he will receive. In order that he may discharge his public duty in an efficient and becoming manner, he must be able both to travel abroad and to live at home like a gentleman; and it is not quite fair to expect that, in addition to sacrificing his professional prospects, he is to do all this out of his private means.

But, apart from all higher and wider considerations, there is an aspect of the affair which can scarcely fail to appeal to those who know the circumstances of many of the junior members of the Bar, from whose ranks the professors must necessarily be chosen. The whole emoluments of the chair, even including the £150 of Bishop's teinds recovered in 1881, have never, with the exception of the last and present sessions, quite reached £500. From a merely pecuniary point of view it is thus inferior to the smallest Sheriff-substituteship; and whilst this continues to be the case, it is obvious that no man of ordinary prudence will accept it, unless he either has at the time, or, at all events, has the prospect of inheriting, some considerable amount of private means. It is a conspicuous as well as an important appointment, which no conceivable increase to the size of the class can ever render self-supporting. To a poor man it would be a 'white elephant,' and the man and the elephant would starve each other. It is surely needless, in these democratic days, to enlarge on the disadvantages of thus limiting the area of choice to the comparatively wealthy.

J. LORIMER.

PUBLIC MEETINGS AND PUBLIC ORDER.

II. BELGIUM.

I.

PARMI les libertés que la Constitution belge garantit aux citoyens, celle qui se lie le plus intimement à la liberté individuelle est sans contredit le droit de réunion. 'Les belges,' dit l'art. 19 de la Constitution, 'ont le droit de s'assembler paisiblement et sans armes, en se conformant aux lois qui peuvent régler l'exercice de ce droit, sans néanmoins le soumettre à une autorisation préalable.'

Cette disposition était en quelque sorte la contrepartie du régime que la domination française avait introduit en Belgique, et qui avait trouvé son expression caractéristique dans les articles 291 et 294 du Code pénal de 1810, qui prohibaient toute association de plus de vingt personnes dont le but serait de se réunir à certains jours marqués ou tous les jours pour s'occuper d'objets religieux, littéraires, politiques, ou autres, sauf l'autorisation du gouvernement et sous les conditions qu'il plairait à l'autorité publique d'imposer à la société; et qui punissaient d'une amende de frs. 16 à frs. 200 les chefs, directeurs ou administrateurs de l'association ou même tout individu qui, sans la permission de l'autorité municipale, aurait accordé ou consenti l'usage de sa maison ou de son appartement, en tout ou en partie, pour la réunion des membres d'une association même autorisée.

La Constitution belge a fait échapper au régime de l'arbitraire administratif la liberté de réunion et son corollaire, la liberté d'association.

Mais le droit de réunion étant établi dans son principe absolu, comme toutes les libertés dont la Constitution garantit l'usage aux citoyens belges, on comprend que la solution des questions qui concernent exclusivement l'exercice du droit dont il s'agit, ait été abandonnée par nos Constituants aux législateurs futurs; on comprend également que les lois à édicter sur ce point, devant être avant tout constitutionnelles, c'est-à-dire, respecter les droits garantis par le pacte fondamental, ne pourraient imposer à l'exercice du droit de réunion des conditions telles que la liberté des citoyens se trouverait virtuellement entravée ou même supprimée.

La Constitution n'a cru devoir mentionner qu'une seule de ces conditions à cause de son existence historique: celle de l'autorisation

préalable. Elle a mis ainsi le législateur dans l'impossibilité de rétablir un régime contre lequel l'art. 19 s'élève comme une éloquente protestation. Hâtons-nous de dire d'ailleurs que nos mœurs se sont parfaitement accommodées de l'exercice le plus large du droit de réunion et que nos gouvernants n'ont jamais eu à recourir à la sagesse du législateur pour régler l'usage d'une liberté qui, sous forme d'assemblées politiques, scientifiques, religieuses, ou de pur agrément, est devenue en quelque sorte partie intégrante de notre vie publique.

II.

La généralité de la règle posée par l'art. 19, dont nous avons reproduit ci-dessus la première partie, comporte cependant une importante exception que le deuxième paragraphe formule comme suit : 'Cette disposition ne s'applique pas aux rassemblements en plein air, qui restent entièrement soumis aux lois de police.' Le droit absolu de réunion et son corollaire, la défense de toute mesure préventive, ne comprennent donc pas en Belgique les réunions *sur la voie publique*. Les lois de police peuvent soumettre ces assemblées à l'autorisation préalable ; elles peuvent, le cas échéant, les interdire entièrement.

Les lois de police sont, en Belgique, comme partout ailleurs, l'expression des nécessités de l'ordre public : elles sont supérieures à toutes les libertés parce qu'elles constituent la garantie du maintien de la sécurité publique, la préservation de l'ordre social contre l'anarchie. Comme l'a dit un de nos magistrats les plus éminents¹, 'Les lois de police avec le caractère instantané que leur imprime l'urgence des circonstances peuvent créer des obstacles qui ont à la rigueur, si on veut, le caractère préventif de ces lois, mais qui sont en réalité et par essence une repression actuelle et nécessaire d'un désordre qui détruisait aveuglément toute liberté quelconque, si bien qu'il est permis d'affirmer par exemple que, dans tel péril social prévu et annoncé, l'obstacle opposé à l'exercice actuel d'une liberté est à la fois un acte de préservation pour cette liberté et un acte préventif temporaire contre l'obstacle coupable et médité.'

On remarquera, ici également, la généralité des termes de la disposition, celle-ci ne faisant aucune distinction suivant la nature ou l'objet du rassemblement. Il importe donc peu quel est le caractère de la réunion en plein air : la police peut, dans tous les cas, la soumettre à certaines formalités, par exemple, à l'autorisation préalable, fixer l'heure et le lieu, et s'il s'agit d'un cortège, d'une procession, déterminer le parcours, ou bien encore défendre purement et simplement le rassemblement. En Belgique, où les questions qui inté-

¹ M. Faider, ancien procureur général à la cour de cassation.

ressent la liberté de la religion catholique ont la spécialité de passionner les esprits, de vifs débats se sont élevés dans la presse, au sein de la législature, devant les tribunaux, sur le point de savoir si, en vertu de la disposition précitée, les actes du culte qui occasionnent des rassemblements en plein air, comme les processions, les pèlerinages, sont soumis aux règlements de police.

On a soutenu que la liberté absolue des cultes et de leurs manifestations extérieures que la Constitution garantit formellement, était incompatible avec les mesures préventives et restrictives que peuvent décréter les règlements en question ; que si l'exercice public d'un acte du culte était de nature à produire des troubles, il appartenait à l'autorité locale, non d'interdire cet acte, mais d'en protéger l'accomplissement et de réprimer les délits qui pourraient se commettre à cette occasion. Mais le pouvoir judiciaire supérieur—la cour de cassation—a rejeté cette doctrine ; elle a répondu aux défenseurs de la liberté illimitée que, du moment que les citoyens descendent dans la rue pour manifester leurs opinions, que celles-ci soient politiques ou religieuses, ils doivent se soumettre aux règles qui régissent tous les rassemblements sur la voie publique et que la Constitution n'a accordé sous ce rapport aucun privilège spécial au culte ni à ses ministres.

Les règlements de police ont pour but, dans l'espèce qui nous occupe, la sûreté et la tranquillité dans les rues suivant l'expression de la loi de 1789. Il suit de là, que les mesures prises par ces règlements relativement à l'exercice du droit de réunion ne doivent avoir d'autre préoccupation que la préservation de l'ordre public et qu'elles doivent, à moins que cet ordre ne risque d'être troublé, respecter le principe de la liberté de réunion. Il est à peine nécessaire d'insister sur ce point. La Constitution, en soumettant les rassemblements en plein air aux lois de police, n'a pas permis aux autorités locales de prohiber d'une manière générale et absolue ces rassemblements ni même de les soumettre de la même manière à la nécessité de l'autorisation préalable. Elle a voulu simplement donner aux autorités en question le pouvoir d'imposer l'autorisation ou de prohiber telle réunion, si le maintien de l'ordre public l'exige.

III.

Le service de la police rentre dans les attributions du pouvoir communal ou municipal (lois de 1789 et 1790 ; loi communale de 1836). C'est, en principe, au conseil communal qu'il appartient de décréter les règlements de police, et par conséquent de prendre, le cas échéant, les mesures que nécessitent les rassemblements en plein air. Toutefois, on comprend aisément que, dans les temps de

troubles, d'émeutes, lorsque l'autorité n'intervient sûrement qu'à la condition d'intervenir rapidement, il est difficile, sinon impossible, de recourir à un pouvoir exclusivement délibérant comme le conseil communal pour prendre les dispositions urgentes que réclament les circonstances. Le bourgmestre, c'est-à-dire le chef responsable de la commune, celui qui en représente le pouvoir exécutif, est le seul qui soit à même de faire face aux événements avec la rapidité nécessaire. Aussi la loi communale dispose-t-elle 'qu'en cas d'émeutes, d'attroupements hostiles, d'atteintes graves portées à la paix publique ou d'autres événements imprévus, lorsque le moindre retard pourrait occasionner des dangers ou des dommages pour les habitants, le bourgmestre pourra faire des règlements et ordonnances de police à charge d'en donner immédiatement communication au conseil' (art. 94¹). Le bourgmestre a donc le droit d'intervenir directement et personnellement pour défendre les rassemblements en plein air, les attroupements sur la voie publique, et c'est ce qu'il a fait dans l'affaire des processions jubilaires, dont il a été question ci-dessus. Seulement le gouverneur, représentant du pouvoir central, du roi, dans le ressort de la province, et le roi lui-même peuvent, si les événements leur en laissent le temps, intervenir pour annuler le règlement de police du bourgmestre. Mais il convient de remarquer ici que l'intervention de l'autorité supérieure ne peut porter que sur la légalité de l'ordonnance: ce n'est pas cette autorité qui est chargée de la police locale, mais bien les administrations communales. Ce sont donc celles-ci et, le cas échéant, le bourgmestre spécialement, qui sont les seuls juges de l'opportunité des mesures auxquelles il y a lieu de recourir pour maintenir la paix publique. Ainsi le gouvernement ne serait pas en droit d'annuler un règlement de police défendant une procession, un *meeting* en plein air, un cortège socialiste, sous prétexte que le règlement ne se justifierait pas, par le motif que la crainte de troubles n'était pas fondée, était même purement chimérique. C'est à l'autorité communale qu'il appartient de juger souverainement de ce point et de prendre les mesures en conséquence.

En terminant sur cette matière je dois noter que la liberté absolue du droit de réunion (en dehors des rassemblements en plein air) ne fait nullement obstacle à l'exercice du droit de police sur les lieux publics, tels que cafés, marchés, théâtres, et en général toutes les salles publiques. Mais les réunions dans ces lieux ne peuvent jamais être soumises à une autorisation préalable; l'autorité com-

¹ Le bourgmestre doit suivant la même disposition envoyer immédiatement copie de l'ordonnance de police au gouverneur de la province, en y joignant les motifs pour lesquels il a cru devoir se dispenser de recourir au conseil. L'expédition de l'ordonnance peut être suspendue par le gouverneur. Dans ce dernier cas, c'est le roi qui décide en dernier lieu sur la légalité ou la nécessité de l'ordonnance.

munale n'a pas le droit d'interdire un *meeting* dans une salle publique, encore qu'elle eût des raisons d'appréhender que cette réunion serait tumultueuse et entraînerait des désordres dans la rue. De même, ainsi que le dit un des juriconsultes qui se sont spécialement occupés de cette matière¹, la police pourrait ordonner la fermeture des théâtres, églises, comme des cafés et cabarets à certaines heures, par exemple, de la nuit, mais elle ne pourrait établir pareille règle pour les heures où les citoyens paisibles se rendent d'ordinaire dans ces différents lieux, sans violer la liberté individuelle, la liberté des cultes et le droit de réunion.

Cette matière peut donner bien à des questions délicates, d'une solution parfois malaisée. Mais la rareté des décisions administratives ou judiciaires sur cet objet prouve qu'en Belgique l'usage d'une large liberté n'a point engendré d'abus importants.

IV.

Il nous reste à examiner maintenant quels sont les droits de l'autorité civile dans le cas où les attroupements devenant tumultueux. l'ordre est troublé et qu'il faut le rétablir.

On a vu ci-dessus que le soin du maintien de l'ordre revenait à la police locale : c'est donc aux agents de celle-ci qu'il appartient de prendre les mesures que nécessite le rétablissement de la paix publique.

Mais il peut arriver que la police soit impuissante à réprimer les troubles, à s'apposer aux actes qui menacent la tranquillité publique. Dans ce cas il y a lieu de requérir la force armée représentée en Belgique par la gendarmerie², la garde civique³, et l'armée proprement dite. Le droit de réquisition est conféré par l'art. 105 de la loi communale au bourgmestre, ou à celui qui le remplace, 'dans le cas d'émeutes, d'attroupements hostiles, ou d'atteintes graves portées à la paix publique.'

Le bourgmestre requiert directement sans aucun intermédiaire. La garde civique, comme l'autorité militaire (la gendarmerie comprise), sont *obligées* de se conformer à sa réquisition.

Cet acte du bourgmestre, responsable, comme premier magistrat de la cité, du maintien de l'ordre, n'est soumis à aucune approbation, ni immédiate ni postérieure. Le bourgmestre agit *motu proprio* ; il n'a à prendre conseil que de lui-même.

La loi exige que la réquisition ait lieu par écrit pour qu'aucune

¹ Sérésia, Du Droit de Police des Conseils Communaux.

² La gendarmerie est un corps armé spécialement chargé du maintien de l'ordre et de l'exécution de la loi dans toute l'étendue du royaume ; elle se trouve sous la direction du pouvoir central.

³ La garde civique n'est pas un corps militaire proprement ; c'est la bourgeoisie armée pour le maintien de l'ordre dans la commune.

doute ne puisse exister dans l'esprit de ceux qui sont tenus d'y déférer.

Mais le bourgmestre n'est pas le seul à pouvoir, dans les cas indiqués ci-dessus, requérir le secours de la force armée. Le même privilège est accordé aux gouverneurs et aux commissaires d'arrondissement, représentants du pouvoir central¹. Cependant il est admis que c'est à l'autorité locale qu'il appartient de prendre l'initiative, en vertu même de la mission spéciale de police qui lui incombe, et que le commissaire d'arrondissement d'abord, le gouverneur en suite, ne doivent intervenir qu'en cas d'inaction ou de résistance du bourgmestre (loi du 8 mai 1848).

Il résulte de ce qui précède que l'autorité militaire ne peut intervenir spontanément ; elle ne doit agir que si son aide est réclamée. C'est donc l'autorité civile qui seule apprécie si les rassemblements compromettent l'ordre public, si la police est suffisante pour les dissiper, et si l'emploi de la force armée est nécessaire. L'autorité militaire ne pourrait pas plus prendre l'initiative de l'intervention qu'elle ne pourrait refuser de déférer à la réquisition. Le refus, dans ce dernier cas, rendrait le commandant de gendarmerie, l'officier ou le sous-officier passible d'un emprisonnement de quinze jours à trois mois (art. 259, Code pénal).

Il est admis également que la garde civique ne doit être requise que lorsqu'il a été constaté que la police et la gendarmerie sont impuissantes à rétablir l'ordre, et que ce n'est qu'à la dernière extrémité, quand la garde civique elle-même est débordée, que l'on doit avoir recours à l'intervention de l'armée.

Il est reconnu enfin qu'une fois la réquisition adressée, l'autorité civile n'a plus à s'immiscer dans les opérations militaires. Le nombre des troupes, la choix des armes, leur emplacement et leur mouvement sont abandonnés à l'officier commandant sous sa responsabilité. Les instructions du ministère de la guerre ont toujours été dans ce sens.

Il ne faut pas oublier que l'autorité militaire peut agir directement, sans réquisition, quand elle est elle-même attaquée ; elle se trouve alors dans le cas de légitime défense. De même, dans le cas de flagrant délit elle peut intervenir pour empêcher les pillages ou les violences contre les personnes (art. 106, Code d'instruction criminelle).

V.

Mais la réquisition ne suffit pas pour autoriser de la part des soldats requis l'emploi des armes. Celui-ci doit être précédé d'une

¹ La Belgique est divisée en provinces à la tête desquelles se trouvent des magistrats nommés par le roi et agents du gouvernement. Les provinces se subdivisent en arrondissements administrés par un commissaire.

sommation faite et trois fois répétée par le bourgmestre, l'échevin ou le commissaire de police aux perturbateurs, d'avoir à se séparer et de rentrer dans l'ordre à peine d'y être contraints par la force.

Si la troisième sommation est restée sans résultat, l'autorité civile n'a plus qu'à se retirer et laisser l'autorité militaire maîtresse de rétablir l'ordre par tous les moyens qu'elle a à sa disposition.

L'officier civil qui fait la sommation doit être revêtu de ses insignes afin que nul ne puisse se méprendre sur sa qualité.

Si, après la première ou la seconde sommation, il n'est plus possible de faire l'autre, ou si des actes de violences rendent même la première sommation impossible, il faut employer immédiatement la force (art. 27 du Décret de 1791).

H. LENTZ,

Docteur en droit, directeur général au
ministère de la justice.

III. FRANCE.

LES dispositions du Code pénal et des lois spéciales qui prévoient et répriment les atteintes portées à l'ordre public sont applicables les unes à des actes correctionnels, les autres à des faits d'une moindre gravité.

Le Code pénal punit de la déportation dans une enceinte fortifiée : 1°. l'attentat qui a pour but soit de détruire ou de changer le gouvernement, soit d'exciter les citoyens à s'armer contre l'autorité gouvernementale (art. 87) ; 2°. l'attentat qui a pour but soit d'exciter à la guerre civile en armant ou en portant les citoyens ou habitants à s'armer les uns contre les autres, soit de porter la dévastation, le massacre ou le pillage dans une ou plusieurs communes (art. 91).

La même peine est prononcée contre tout individu qui se met à la tête de bandes armées, ou qui y exerce une fonction ou un commandement quelconque, soit pour envahir des domaines, propriétés ou deniers publics, places, villes, forteresses, postes, magasins, arsenaux, ports, vaisseaux ou bâtiments appartenant à l'état, soit pour piller ou partager des propriétés publiques ou nationales, ou celles d'une généralité de citoyens, soit enfin pour faire attaque ou résistance envers la force publique agissant contre les auteurs de ces crimes (art. 96). Les individus qui ont fait partie d'une bande organisée et armée, sans y exercer aucun commandement ou emploi, et qui ont été saisis sur le lieu de la sédition, sont passibles de la même peine, lorsque cette bande a exécuté ou tenté l'un des attentats ci-dessus mentionnés (art. 97), et, en dehors de ce cas, de la

déportation simple (art. 98). Mais aucune peine ne doit être prononcée pour fait de sédition contre ceux qui ayant fait partie de ces bandes, sans y exercer aucun commandement et sans y remplir aucun emploi ni fonction, se sont retirés au premier avertissement des autorités civiles ou militaires, ou même depuis, lorsqu'ils n'ont été saisis que hors du lieu de la réunion séditieuse, sans opposer de résistance et sans armes (art. 100).

Sous la monarchie constitutionnelle, la Cour des Pairs était appelée à connaître des attentats contre la sûreté de l'État prévus par les art. 87 et 91 précités du Code pénal. La haute Cour de Justice pouvait en être saisie, sous la constitution de 1848, par un décret de l'Assemblée Nationale, et, sous la constitution de 1852, par un décret de l'empereur. Les auteurs de crimes de cette nature peuvent aujourd'hui, en vertu de l'art. 9 de la loi constitutionnelle du 24 février 1875, être déférés au Sénat constitué en Cour de Justice.

La loi du 24 mai 1834, rendue à la suite des graves insurrections qui troublèrent le pays dans les premières années du règne de Louis-Philippe, a eu pour objet d'atteindre un certain nombre d'actes qui n'avaient pas paru rentrer exactement dans les prévisions des articles précités du Code pénal. Elle punit de la détention les individus qui, dans un mouvement insurrectionnel, ont porté soit des armes apparentes ou cachées ou des munitions, soit un uniforme, un costume ou d'autres insignes civils ou militaires. Si les individus porteurs d'armes ou de munitions sont en outre revêtus d'un uniforme, d'un costume ou d'autres insignes, ils sont passibles de la déportation, et, s'ils font usage de leurs armes, de la déportation dans une enceinte fortifiée (art. 9). La peine des travaux forcés à temps, à laquelle doit être ajoutée une amende de 200 à 5000 francs, est applicable à ceux qui, dans un mouvement insurrectionnel, se sont emparés d'armes ou de munitions, soit à l'aide de violences ou de menaces, soit par le pillage des boutiques, postes, magasins, arsenaux, etc., soit par le désarmement des agents de la force publique (art. 6). La même peine est encourue par ceux qui, dans un mouvement insurrectionnel, ont envahi, à l'aide de violences ou menaces, une maison habitée ou servant à l'habitation (art. 7). Les art. 8 et 9 prévoient d'autres faits insurrectionnels distincts de la prise d'armes et punissent de la peine de la détention : 1°. L'envahissement ou l'occupation, dans un mouvement insurrectionnel, et pour faire attaque ou résistance à la force publique, d'édifices, postes, ou autres établissements publics ; 2°. l'occupation dans le même but d'une maison privée avec le consentement du propriétaire ou du locataire ; 3°. la construction de barricades, retranchements ou autres travaux ayant pour objet d'entraver l'exercice de la force publique ; 4°. le fait d'empêcher, à l'aide de violences ou de me-

nances, la convocation ou la réunion de la force publique ; 5°. le fait de provoquer ou de faciliter le rassemblement des insurgés, soit par la distribution d'ordres ou de proclamations, soit par le port de drapeaux ou autres signes de ralliement, soit par tout autre moyen d'appel ; 6°. les actes qui tendent à intercepter par un moyen quelconque, avec violences ou menaces, les communications ou la correspondance entre les divers dépositaires de l'autorité publique.

Le législateur ne s'est pas borné à frapper de peines sévères les actes insurrectionnels : il a jugé nécessaire de réprimer par des dispositions spéciales les manifestations tumultueuses qui se produisent sur la voie publique et qui persistent, malgré les injonctions de l'autorité. La première loi portée contre les attroupements a été celle du 21 octobre 1789, célèbre sous le nom de *loi martiale*, et en vertu de laquelle Bailly et Lafayette ont fait disperser par la force, en 1791, les rassemblements séditieux du Champ de Mars. Aux termes de cette loi, lorsque la tranquillité publique était en péril, les officiers municipaux étaient tenus de déclarer que la force militaire devait être employée pour rétablir l'ordre : cette déclaration se faisait en arborant à la maison de ville et en promenant dans les rues le drapeau rouge ; à ce signal tous les attroupements, avec ou sans armes, devenaient criminels et devaient être dissipés par la force. Les prescriptions rigoureuses de cette loi ont été restreintes dans leur application par le décret du 26 juillet 1791. Ce dernier décret a lui-même été successivement modifié et complété par la loi du 10 avril 1831 et par celle du 7 juin 1848, qui n'a pas cessé d'être en vigueur. L'article 1^{er} de cette dernière loi interdit d'une manière absolue tout attroupement armé sur la voie publique ; il interdit également les attroupements non armés dans le cas où ils peuvent troubler la tranquillité publique. Pour qu'un rassemblement soit considéré comme illicite, il faut, d'après le décret de 1791, qu'il soit composé de plus de quinze personnes. Lorsqu'un attroupement armé ou non armé se forme sur la voie publique, le maire ou, à son défaut, tout autre agent ou dépositaire de la force publique revêtu de l'écharpe tricolore, se rend sur le lieu de l'attroupement. Si cet attroupement est armé, il lui fait sommation de se dissoudre ; si cette première sommation reste sans effet, une deuxième sommation, précédée d'un roulement de tambour, est faite par le magistrat, et, en cas de résistance, l'attroupement est dissipé par la force. Si l'attroupement est sans armes, le magistrat, après le premier roulement de tambour, exhorte les citoyens à se retirer. S'ils n'obtempèrent pas à cette injonction, trois sommations sont successivement faites, et, en cas de résistance, l'attroupement est dissipé par la force (loi du 7 juin 1848, art. 4). L'individu porteur d'armes faisant partie d'un rassemblement armé

qui s'est dissipé après la première sommation, et sans avoir fait usage de ses armes, est puni d'un emprisonnement d'un mois à un an. La peine est portée d'un à trois ans d'emprisonnement si l'attroupement s'est formé pendant la nuit. Si l'attroupement ne s'est dissipé qu'après la deuxième sommation, mais avant l'emploi de la force, et sans qu'il ait fait usage de ses armes, la peine est d'un à trois ans d'emprisonnement; cet emprisonnement est de deux à cinq ans si l'attroupement s'est formé pendant la nuit. La peine est de cinq à dix ans de détention lorsque l'attroupement ne s'est dissipé que devant la force, et de cinq à dix ans de réclusion lorsque l'attroupement ne s'est dissipé qu'après avoir fait usage de ses armes. La peine de la réclusion est également applicable, lorsque l'attroupement a lieu la nuit, s'il ne s'est dissipé que devant la force ou après avoir fait usage de ses armes (art. 4). Quiconque faisant partie d'un attroupement non armé ne l'a pas abandonné après le roulement de tambour précédant la deuxième sommation, encourt un emprisonnement de quinze jours à six mois. La peine est de six mois à deux ans d'emprisonnement lorsque l'attroupement n'a été dissipé que par la force (art. 5).

La loi du 30 juin 1881 sur la liberté de réunion a laissé subsister toute entière la loi du 7 juin 1848. Elle interdit les réunions sur la voie publique (art. 6), et il a été reconnu dans la discussion que les réunions accidentelles qui se formeraient sur la voie publique, en dehors de toute formalité, demeureraient soumises aux dispositions de la loi sur les attroupements. Mais il a été également reconnu que l'autorité municipale pouvait accorder l'autorisation de tenir une réunion sur la voie publique.

Le principe de la responsabilité des communes en cas de crimes ou délits commis à force ouverte et par attroupements sur leur territoire a été consacré par la loi du 10 Vendémiaire, an IV. Cette loi d'une rigueur draconienne a été rendue quelques jours avant la journée du 13 Vendémiaire, dans laquelle l'artillerie de la Convention mitrilla sur les escaliers de l'Eglise St. Roch les sections parisiennes insurgées, et où commença la fortune politique du général Bonaparte. Elle déclarait tous les habitants de la commune civilement garants des crimes et délits; elle leur imposait à titre de réparation la restitution des choses pillées ou détruites ou le paiement du double de la valeur de ces objets et en outre des dommages—intérêts qui ne pouvaient être inférieurs à cette valeur et une amende égale au profit du Trésor. La loi municipale du 5 avril 1884 (art. 106 et suivants) a maintenu le principe de la loi de Vendémiaire, mais elle en a atténué les dispositions les plus rigoureuses. A la responsabilité des habitants elle a substitué celle de la commune, sauf répartition ultérieure du montant des condamnations

entre les habitants. Pour que la commune soit responsable, il faut : 1°. qu'il y ait préjudice causé soit aux personnes soit aux propriétés publiques ou privées ; 2°. que ce dommage ait été causé par des attroupements ; 3°. que le délit ait été commis à force ouverte ou par violence. La loi municipale supprime l'amende qui devait être infligée au profit de l'Etat, et laisse aux tribunaux le soin d'arbitrer les dommages—intérêts conformément au droit commun. La commune doit être déchargée de toute responsabilité, 1°. lorsqu'elle peut prouver que toutes les mesures qui étaient en son pouvoir ont été prises à l'effet de prévenir les attroupements et d'en faire connaître les auteurs ; 2°. lorsque les dommages causés sont le résultat d'un fait de guerre ; 3°. dans les communes où la municipalité n'a pas la disposition de la police locale ni de la force armée. Cette dernière exception comprend la ville de Paris, celle de Lyon et les villes qui sont placées sous le régime de l'état de siège.

ALBERT GIGOT,

Ancien Préfet de Police.

[It will be observed that the special enactments referred to were all passed by constitutional, and the most important of them by republican legislatures.—EDITOR.]

IV. SWITZERLAND.

THE right of public meeting [so far as implied in that of forming lawful associations] is guaranteed by the federal constitutions of 1848 and 1874 (art. 56). The former constitutions of 1815 contained no such guarantee, nor that of 1803 called Mediation, or the Helvetic constitution of 1798. This right of public meeting is guaranteed to Swiss citizens only, and to foreigners belonging to states which have concluded treaties of reciprocal rights of settlement, who are accordingly admitted to reside in any of the Swiss cantons on the same footing, and on the same conditions as citizens of the other Swiss cantons. British subjects are therefore entitled to have public meetings and to form associations if they are resident in Switzerland, but foreigners domiciled abroad have not the right to hold public meetings in Switzerland. The government of Zürich was therefore within its right in forbidding an international congress of Socialists.

The right of public meeting is however not so absolutely guaranteed by the federal constitution as other individual rights are; for instance, the freedom of the press¹, but dependent on political reasons, and the scope and means of the meetings. The execution of Article 56 of the federal constitution is reserved to the cantons, but the federal tribunal can, when the case arises, decide on appeal whether the principle of the constitution is violated or not. Suppose the cantonal government interdicts a meeting for its dangerous character, then the federal tribunal has on appeal to examine the merits of the case, and to decide accordingly. In the case of the international meeting of Socialists at Zürich, the tribunal confirmed the prohibition issued by the government of Zürich. On the whole, the governments are very liberal, and the cases of interdiction very scarce, but the right of interdiction of meetings having a dangerous or seditious character cannot be contested, and is used if necessary.

Resistance to public officers is not dealt with by the federal constitution, but is left to the cantonal legislation or cantonal constitutions. The constitution of the canton of Bern justifies resistance against the unlawful entering of a house by an official or a policeman. Complaints of this kind are very rare in Switzerland. On the other hand, the public assembling of people with the intention of resisting public authorities by force, or of forcing them to revoke any measure, or of taking revenge on public authorities for measures executed by them, is treated as riot by the federal penal code. If the riot ceases after the formal summons which answers to the so-called reading of the Riot Act in England, the instigators are nevertheless punishable with two years' imprisonment with hard labour; and if the authorities are obliged to restore order by force, then the participants are punishable with from two years' imprisonment with hard labour to ten years' penal servitude, if loss of life or injury to person or property has taken place. In case of less serious harm having been done the penalties are milder (Code Pénal of 1853, art. 46). The cantonal penal codes deal in the same way and almost in the same words with resistance to any public authority in the exercise of its duties or functions, and violence offered to public officers.

On the whole, resistance to public authority and public officers is subjected to various penalties by both federal and cantonal laws. Although executive government is not so strong in Switzerland as in the monarchical states of the Continent, resistance to the

¹ 'Die Pressfreiheit ist gewährleistet,' art. 55. The language of art. 56 is 'Die Bürger haben das Recht, Vereine zu bilden, sofern,' &c.

execution of the law, and to public officers in the exercise of their office, is not favoured by public opinion, and is not of common occurrence.

K. G. KÖNIG.

[We are compelled by want of space to omit the extracts from cantonal constitutions—those of Ticino, Luzern, Solothurn, Bern, Aargau, and Zürich—which were added in Dr. König's MS.]

We have received, just before going to press, an article on the law of the United States—in other words, the received American interpretation and application of the Common Law—by Mr. Edmund H. Bennett, Dean of the Law School of Boston University. This will appear in our July number. Meanwhile we extract a few sentences. 'A public meeting becomes unlawful so soon as from general appearances and all the surrounding circumstances it naturally excites terror, alarm, and consternation in the minds of peaceable and law-abiding citizens; so soon as in the minds of rational and firm-minded men it is likely to endanger the peace and tranquillity of the neighbourhood. . . . When that condition of things exists, that moment the peace officer may intervene and disperse the assembly. Whether that state of things does or does not exist must be finally passed upon by a jury of the country in prosecutions arising out of such interference. No abstract rule can be laid down beforehand, but it is safe to say that in America the inclination of juries as a rule is to support law and order, and to protect the officer in the *bona fide* discharge of his apparent duty on such critical occasions.'—EDITOR.

CURIOSITIES OF COPYRIGHT LAW.

DEFORMITY, if sufficiently choice, is to the Oriental eye as admirable as beauty and symmetry. The Western mind, while waiting patiently for a finer model, may perhaps occupy itself in that admiration which is not approval,—admiration of some features of the Law of Copyright—Literary, Dramatic, Artistic, and Musical.

It should be premised that in this article the term Copyright means only those rights which are the creation of Statute, as opposed to those which exist at Common Law. No fewer than fifteen statutes have dealt with the topic, many of them remarkable for the variety of their effects and for the difficulty and impurity of their style.

A Royal Commission which reported in 1878 on the whole subject did justice to the bad grammar, to be found in 5 & 6 Vic. c. 45, § 18,—to the first section of 54 G. iii. c. 56, which is styled 'a miracle of intricacy and verbosity,' in which an 'of' appears which 'may be a misprint,' and the first half of the section is repeated in the second half with every circumstance of difficulty,—and to the carefulness with which the Statute 17 G. iii. c. 57, one sentence of fifty-five lines, was passed to qualify a sentence of sixty-one lines, i. e. 8 G. ii. c. 13, § 1 in two small particulars.

The Commission reported recommending Codification, with certain amendments in the substantive law. As a result one small amending Statute was passed four years afterwards (45 & 46 Vic. c. 40). The only thing that detracted from its efficiency was that by ill luck no sanction had been provided for disobedience.

At Common Law a man has before 'publication' a right of property in his own productions, literary or artistic, in virtue of which he can restrain any person from copying them (*Prince Albert v. Strange*, 1 Mac. & Gor. 25; *Duke of Queensberry v. Shebbeare*, 2 Eden 329). What constitutes 'publication' is hard to say, and probably each class of case should be judged on its own merits, but it seems that for publication in the vulgar sense to be publication in the legal sense it must not be clogged with conditions or trusts, express or implied (*Mayall v. Higbey*, 1 H. & C. 48; *Abernethy v. Hutchinson*, 1 Hall & Twell. 28; *Caird v. Sime*, 12 Ap. Ca. 326).

The effect of 'publication' on the Common Law right of property has been the occasion of learned difference (*Millar v. Taylor*, 4 Burr. 2303; *Donaldson v. Beckett*, 4 Burr. 2408; *Jeffreys v. Boosey*, 4 H. L. C. 815). But the victorious opinion seems to be that after

publication the only rights existing are those conferred by Statute, that is to say, Copyright, the exclusive right to multiply copies.

The present state of the Law of Copyright seems to be this. The term of copyright in Books and in printed and published Dramatic Pieces and Music under 5 & 6 Vic. c. 45, § 3 is the life of the author and seven years after his death, or forty-two years from the date of publication, whichever is the longer.

The term of copyright in Music not printed and published, but publicly performed, is (under the provisions of 3 Will. IV. c. 15, § 1, and 5 & 6 Vic. c. 45, § 20), according to the report of the Royal Commission, doubtful, and may be perhaps perpetual, while that in Lectures not printed and published, but publicly delivered, is wholly uncertain; but in Lectures printed and published it is the life of the author, or twenty-eight years from publication, whichever is the longer (5 & 6 Will. IV. c. 65).

The term for Engravings, Etchings, and Prints is twenty-eight years from publication (under 8 G. ii. c. 13; 7 G. iii. c. 38; 17 G. iii. c. 57; 6 & 7 Will. IV. c. 59; 15 & 16 Vic. c. 12, § 14); for Sculptures, fourteen years from putting forth or publishing, and another term of fourteen years if the author is alive at the end of the first term (54 G. iii. c. 56).

Paintings, Drawings, and Photographs come under the provisions of 25 & 26 Vic. c. 68, which gives the author of every original painting, drawing, and photograph copyright for his life and seven years afterwards. No mention, it will be noticed, is made of publication or putting forth as the period from which copyright is to run. To this point further reference will be made.

For establishing the fact of ownership or the date of publication, Registration provides the means, simple, cheap, and efficacious. And the Register at Stationers' Hall is no new invention, nor is it unknown to the Statutes on Copyright. But there are these differences to be noticed. To enable a person to sue for infringements of his Dramatic Copyright or Copyright in Lectures or Engravings, no Registration is needed. To enable a person to sue for infringements of his Copyright in Books and Paintings, Registration is needed, with this further distinction; that after Registration the owner of copyright in a book may, but the owner of copyright in a painting may not, sue for infringements committed before Registration (5 & 6 Vic. c. 45, §§ 13, 24, for Books; 25 & 26 Vic. c. 68, § 4, for Paintings).

To show the difficulty which seems to attend the interpretation of these Statutes, Vice-Chancellor Malins, in the case of *Cox v. Land and Water Journal*, L. R. 9 Eq. 324, decided that a newspaper was neither a 'periodical work' nor a 'sheet of letterpress' within

the meaning of 5 & 6 Vic. c. 45, §§ 18, 2, and so did not require registration, but that there was some sort of copyright after publication; a doctrine not easy to reconcile with that of *Jeffreys v. Boosey*. The late Master of the Rolls declined to follow that decision in *Walter v. Howe*, 18 Ch. D. 709. Two judgments are thus in direct conflict, although possibly small doubt will exist as to which is the correct view.

A question of some nicety of principle is, at what point an author's rights in his work should cease to receive legal protection. Is an author fairly entitled to all the advantages, direct and indirect, which can be extracted from his work? It is generally agreed that it is for the public interest that a man should be entitled to get the full market value of the immediate and sole productions of his unaided hand and brain; and that he should be able to call on the law to protect him in this right. But do his rights go further, and if so, how much further? What amount of added labour or independent research will justify *B* in using the result of *A*'s labour, and making profit out of them? And this is the question of Abridgments and Adaptations, while the principle involved goes to the root of Artistic Copyright. Now, without discussing what is the correct view to take, it seems difficult to see why, allowing for differences in material, a man may dramatise my novel, but may not make a steel engraving of my picture. Neither my novel nor my picture will sell the worse; if anything my novel might. Again, judging from the standpoint of added labour and skill one might say that to produce a fine steel plate was more meritorious and difficult, required rarer faculties, though less remunerative, than to adapt somebody's novel for the boards. The English law allows the latter, but not the former.

Nor is the law of adaptation free from difficulty. In books there is one sort of copyright, in dramatic productions—as in music too—there are two, the literary right as in books, and the performing right. There is apparently no protection for dramatic performances apart from Statute. 'The author of a drama is not protected by the common law' (per Cockburn, C. J., *Toole v. Young*, L. R. 9 Q. B. 527). But when he has written his play and has not printed and published it, he has, it is supposed, the common law rights of property in the literary work, which are not divested by the representation of the play. And the converse of this is true, *Chappell v. Boosey*, 21 Ch. D. 232. The two rights are distinct. In the case of *Macklin v. Richardson*, Amb. 694, the defendant employed shorthand writers to take down the play from the actors' mouths and published it, and it was held that he could not do so. If instead of publishing the dialogue he had thrown it in the form of a novel, it is sug-

gested that he would have been equally wrong, on the analogy of the case where *A* printed a drama which he had made out of *B*'s novel by throwing the novel into dialogue (*Tinsley v. Lucy*, 1 H. & M. 747). If this view is correct, *A* may be restrained from novelising *B*'s play, but *B* may dramatise *A*'s novel (*Read v. Conquest*, 9 C. B. N. S. 755). Add to this that the doctrine that 'a fair abridgment is no piracy' has not been unknown to the law (*Bell v. Walker*, 1 Bro. C. C. 451; *Dodsley v. Kinnearley*, Amb. 403; *Gyles v. Wilcox and Others*, 2 Atk. 141), though this doctrine has undergone considerable limitations of recent years.

The Statute 5 & 6 Vic. c. 45 by § 20 creates a right in the sole liberty of representing or performing any musical composition, and § 21 enacts that the person who has the sole liberty of representing a dramatic piece or musical composition shall have the remedies given by 3 & 4 Will. IV. c. 15, 'as fully as if the same were re-enacted in this Act.' In an action by the owner of the sole liberty of performing a musical composition which was not a dramatic piece to recover penalties for the unauthorised performance of that composition at a place which was *not* a place of dramatic entertainment, it was held that the plaintiff was entitled to recover the penalty of 40s. given by 3 & 4 Will. IV. c. 15, § 2 (*Wall v. Taylor*, *Wall v. Martin*, 9 Q. B. D. 727; 11 Q. B. D. 102). It was before the Royal Commission that many persons had innocently purchased songs at shops, and had sung them at concerts, and were immediately requested to pay 40s. to Mr. Wall, who had become assignee of the sole liberty; and the Report recommended that it should be a condition precedent to action that this sole liberty should be brought to the notice of the intending purchaser by an intimation printed on each copy that the right of public performance was reserved. In an Act 45 & 46 Vic. c. 40, which recited that it was expedient to protect the public from vexatious prosecutions for the recovery of penalties under such circumstances, it was enacted that any person who was desirous of retaining in his own hands exclusively the right of public representation or performance of a musical composition should print the notice recommended by the Royal Commission. But unluckily, as has been said before, nothing was said as to such notice being a condition precedent to action, no sanction was provided for disobedience.

Under the heading of Artistic Copyright comes Copyright in Engravings, Sculptures, Paintings, Drawings, and Photographs.

Works of Art fairly divide themselves into two classes: the first, in which unlimited mechanical reproduction is possible; the second, where it is not; reproduction meaning here such that the copy would be mistaken for the original. The first class would include

engravings by different processes and photographs; the second paintings by Millais, drawings by Flaxman, and perhaps busts by Chantrey.

Now, while unauthorised reproductions of a celebrated photograph or engraving might from their fraudulent faithfulness injure the sale of the thing imitated, an unauthorised imitation of 'Cherry Ripe' would, if it did anything, only serve to advertise the picture and enhance its value. A great picture has no resembling twin.

It is not proposed to examine here whether there should be any copyright at all in works of art, or, if there should be, whether it should be the same for all species of artistic work; but if a difference is made, and if the foregoing division is sound, one would expect to see that engravings got the same treatment as photographs, and paintings the same as drawings, and perhaps as sculptures.

This is, however, not so; and some general observations have already been made on this point. The last Statute, 25 & 26 Vic. c. 68, deals indiscriminately with paintings, drawings, and photographs, invents a new term of copyright for all three, viz. life and seven years after, and, instead of keeping to the old 'publication,' makes copyright run apparently from the making of the artistic work. So that for a sculptor copyright runs from 'first putting forth or publishing'; for the painter and draughtsman from making; for the engraver from 'first publication'; for the photographer from making, while the confusion is heightened by the fact that while Millais is the author of his picture, and a person who pays another to compile a book of designs for him is entitled to the copyright (*Grace v. Newman*, 19 Eq. 623); yet the 'author' of a photograph is the paid assistant who arranges the posture, and takes the cap off the camera (*Nottage v. Jackson*, 11 Q. B. D. 627). The result is, that engravings differ from photographs, sculptures, drawings, and paintings, while paintings, drawings, and photographs, which need have nothing in common, have this in common, that they have nothing in common with anything else.

One must not omit to notice a peculiarity in the Statute 25 & 26 Vic. c. 68. Copyright in this article has been 'the creature of statute' to supply the wants of those common law rights which are divested by 'publication.' The Statute recites, 'by law as now established the authors of paintings, drawings, and photographs have no copyright in such their works.' This, if it means statutory copyright which comes after publication, is quite true. It then proceeds to give the sole and exclusive right of copying, etc. to the author and his assigns for life and seven years after, irre-

spective of publication ; that is, before publication, and while his common law rights are in full force. This is a new meaning of copyright. But this is only a matter of terminology. It is more important to notice that this provision may leave the persons intended to be protected in a worse position than other artists. If *A* makes a drawing, keeps it in his drawer locked up, publishes it one year before his death, his common law rights, which have been existing side by side with his statute rights, both perfectly useless, have gone, and his copyright runs only eight years. Perhaps, however, a few more statutes will make the law better.

The Commission reported in favour of Codification, and my friend, Mr. T. E. Scrutton, a master of the subject, tells me that two bills are drafted, ready to be passed. But Codification is a homely subject, and lacks perhaps parliamentary interest. Neither party advocates it, for neither party opposes it. Practical men agree, so nothing is done. It is late to sing its praises, and the public is deaf, *et sero et surdo canimus*. The topic was sometime no stranger to the schools, we are silent *ne declamatio fiat*. But whether Codification is good because it tends to make the law intelligible, or because it tends to make it intelligent, Copyright Law needs it.

A. T. CARTER.

A DISPUTED POINT IN THE LEX AQUILIA.

(Fr. 11, § 3 *Ad Leg. Ag.* compared with fr. 51 pr. h. t.)

AN exegetical parallel between fr. 11, § 3 *Ad Leg. Ag.* (IX. 2) and fr. 51 pr. h. t. gives rise to one of the most interesting and elegant questions in Roman Law differently dealt with by different writers, and recently resolved in a quite new manner by Professor Ferrini¹.

Fr. 11, § 3 is as follows:—

‘Celsus scribit, si alius mortifero vulnere percusserit, alius postea exanimaverit, priorem quidem non teneri quasi occiderit, sed quasi vulneraverit, quia ex alio vulnere periit, posteriorem teneri, quia occidit. quod et Marcello videtur et est probabilius.’

Fr. 51 pr. h. t. runs thus:—

‘Iulianus libro LXXXVI digestorum. ‘Ita vulneratus est servus, ut eo ictu certum esset moriturum: medio deinde tempore heres institutus est et postea ab alio ictus decessit: quaero an cum utroque de occiso lege Aquilia agi possit. respondit: occidisse dicitur vulgo quidem qui mortis causam quolibet modo praeiit: sed lege Aquilia is demum teneri visus est qui adhibita vi et quasi manu causam mortis praeiunxisset, tracta videlicet interpretatione vocis a caedendo et a caede. rursus Aquilia lege teneri existimati sunt non solum qui ita vulnerassent, ut confestim vita privarent, sed etiam hi quorum ex vulnere certum esset aliquem vita excessurum. igitur si quis servo mortiferum vulnus inflixerit, eundemque alius ex intervallo ita percusserit ut maturius interficeretur quam ex priore vulnere moriturus fuerat, statuendum est utrumque eorum lege Aquilia teneri.’

Thus, according to Celsus' opinion, referred to and accepted by Ulpian in his eighteenth book *ad Edictum*, and agreed with by Marcellus, if a slave had received a deadly wound from one person and had been afterwards killed by another, the former ought to be liable only *de vulnerato*, i. e. under the third chapter of the law, the latter *de occiso*, i. e. under the first chapter of it².

Julianus' opinion stated in fr. 51 pr. h. t. is in full opposition to Celsus'. He said that in the same case supposed by Ulpian both

¹ Rendiconti dell' Istituto Lombardo, Serie II, vol. xix, fasc. v-vi. Postille esegetiche ai frammenti del commentario di Ulpiano alle formule editali ad legem Aquilianam.

² We transcribe here the text of the Aquilian Law as given by Grueber in his valuable work:—*The Roman Law of Damage to Property*. Oxford. 1886. pp. 199.

Chapter I. *Si quis servum servamve alienamve quadrupedemve pecudem iniuria occiderit, quanti ea res in eo anno plurimi fuerit, tantum aes ero dare damnas esto.*

Chapter III. *Ceterarum rerum praeter hominem et pecudem occisos, si quis alteri damnum fuxit, quod usserit fregerit ruperit iniuria, quanti ea res fuerit in diebus triginta proximis, tantum aes domino dare damnas esto.*

[It is uncertain whether the words 'praeter . . . occisos' are part of the ancient text or a gloss of Ulpian or some former text-writer: but this makes no substantial difference.]

wounders, the former as well as the latter, ought to be liable *de occiso*.

Such a contrast of opinions, in a book of law intended for practical purposes as the Digest is, has naturally fatigued the *Interpretes*, who being, the major part of them, inclined to consider Justinian's work as throughout consistent, attempted a dogmatical conciliation of the two contradicting fragments. Mr. Grueber, who is the most recent writer on this matter, thus explains his opinion:—

'The facts of the case are apparently the following: *A* wounds the slave of another person mortally, but before the slave dies *B* comes and kills him, e.g. by cutting off his head. It naturally follows that *B* is liable under the first chapter, whereas *A* is liable only under the third chapter for wounding the slave; for though from the nature of the wound death must necessarily have resulted, yet in this case the death of the slave was caused by the subsequent act of decapitation. This view which, as we learn from the passage, is concurred in by Celsus, Marcellus and Ulpian, underlies also the decision in 15. § 1, h. t., where Ulpian, in harmony with Julian, states that a person who had mortally wounded a slave, who was afterwards killed by the fall of a house or by shipwreck, will be liable under the third and not the first chapter of the *lex*. There is, however, another passage of Julian, 51 pr., which at first sight seems to express a different view, and which has induced several writers to assert that it contradicts the fragment we are considering. There also a case is supposed, in which a slave who was mortally wounded by one person was afterwards wounded by another in consequence; but here both the persons are declared to be liable under the first chapter. A careful examination of this passage, however, shows that it was only caused in concurrence with the wound already inflicted on the slave, that his death followed earlier ("*ut maturius interficeretur*") than was expected from the first wound. Accordingly both the wounds were necessary to effect the death just at the time when it happened, and therefore both the delinquents are liable for having killed the slave¹.

In this point of his work the learned author accepts Vangerow's opinion without taking into account the difficulties to which it is exposed. He exaggerates the importance of the moment in which the death of the slave takes place. According to him, in fr. 11, § 3, the second blow kills instantly—like a decapitation—and so breaks the causal connection between the first blow and the death; in fr. 51 pr., on the contrary, it does not kill instantly, but simply causes the slave's death to take place sooner than it would have done if there had been no second blow. The distinction, however, can be maintained neither logically nor with reference to the text. The texts do not make such distinctions as Mr. Grueber says between

¹ op. cit. p. 36.

the second wound spoken of in fr. 11, § 3, and that in fr. 51 pr., and even if we could grant some importance to the two different expressions — *postea exanimaverit* and *maturius interficeretur*, the causal connection would be broken in fr. 51 pr. as well as in fr. 11, § 3. But what is more important, Mr. Grueber overlooks another fragment of the Digest which clearly shows that in the case considered by Julianus in fr. 51 pr. the second blow was immediately followed by death. I mean fr. 51, § 2, that runs as follows:—

'Aestimatio autem perempti non eadem in utriusque persona fiet: nam qui prior vulneravit tantum praestabit quanto in anno proximo homo plurimi fuerit repetitis ex die vulneris trecentum sexaginta quinque diebus, posterior in id tenebitur quanti homo plurimi venire poterit in anno proximo quo vita excessit, in quo pretium quoque hereditatis erit.'

If Julianus said that the second wounder in fr. 51 pr. *tenebitur quanto in anno proximo homo plurimi fuerit*, this is the most clear proof that the second blow, in the case under consideration, had precisely the effects which Vangerow and Grueber would assign only to that spoken of in fr. 11, § 3, for as it appears from fr. 21, § 1, it was Julian's opinion that 'the year to be taken into account when assessing the highest value of the slave was to be reckoned backwards from the moment the deadly wound had been inflicted.' Grueber's opinion cannot consequently be accepted.

Professor Ferrini rejecting all theories propounded till nowadays has attempted a new explanation of the two fragments. The case made by Julianus in fr. 51 pr. must in his opinion be considered under a different point of view from that considered in fr. 11, § 3. 'Julianus thought,' says he¹, 'that in the case of a slave wounded with such a wound as generally produces death and who is afterwards killed by another person, it is always doubtful to whom the death can be ascribed. The first blow might, owing to the strong constitution of the slave or to other favourable circumstances, have been cured; the second would not have produced the death of the slave if he had not already been infirm, owing to the preceding blow.'

Fr. 51, § 1 affords, at first sight, a solid argument in favour of this opinion:—

'Idque est consequens auctoritati veterum, qui cum a pluribus idem servus ita vulneratus esset ut non pareret cuius ictu perisset, omnes lege Aquilia teneri indicaverunt.'

Nevertheless on thorough consideration the new opinion cannot be maintained. First of all, are we sure that § 1 occupied in Julian's

¹ op. cit. p. 251

libri digestorum the same position it has in the *Corpus Juris*? It might be otherwise, but Professor Ferrini assumes it as sure. He begins stating that a wound *qua certum esset aliquem vita excesurum* is a wound capable generally of causing a slave to die. That is going a little too far. Why should the jurist speak of a wound as certain to have a fatal result, if he meant only a wound not necessarily mortal, but capable of causing death? True it is that practically it is very difficult to determine the absolute fatality of a wound, but it is also true that every reasoning requires a fact, real or supposed, to start from. On the other hand, it very often occurs that a juridical theory breaks down under the difficulties of practical applications, as law is rigid and formulated whilst life is varied and changeable. Let us accept for an instant Ferrini's opinion, then how could we explain fr. 11, § 2?—

Sed si plures servum percusserint, utrum omnes quasi occiderint teneantur, videamus. et si quidem apparet cuius ictu perierit, ille quasi occiderit tenetur: quod si non apparet, omnes quasi occiderint teneri Iulianus ait, et si cum uno agitur, caeteri non liberantur: nam ex lege Aquilia quod alius praestitit alium non relevat, cum sit poena.¹

It is here stated by Ulpian in what case Julianus thought that the principles of complicity came in and how they did. May we say that in fr. 51 pr. *non apparet cuius ictu servus perierit*? On the contrary the jurist starts from the supposition that the slave was definitively killed by the second blow. Let us even suppose that this fragment does not exist, what is to be understood by Ferrini's complicity: a subjective one, a conspiracy among the wounders? Such complicity is quite disregarded in suing under the Aquilian Statute. If he intends an objective complicity, then it is excluded by the supposition made by the jurist that the first blow is deadly.

We cannot then accept even Ferrini's theory, and the contradiction of the two fragments remains. Resort to such ingenuous explanations as that given by the Glossa¹ is not allowed nowadays. If, according to it, we said that fr. 11, § 3 did not consider the case of a first deadly wound, the application of the law would be by far easier, but the scientific study of it would not gain anything by doing so.

We believe that one must never forget that the *Corpus Juris* is a mosaic made out of fragments of numerous works belonging to different ages and very different men, and that it was composed in a very short time, so that even to professors and lawyers greater than those to whom the work was intrusted, it would have been impossible to avoid little theoretical discordances. The contrast of opinions

¹ The opinion of the Glossa is agreed upon by the latest Byzantini: s. Ferrini, op. cit. 247.

arising by the comparison of the two fragments before us is one of them.

But such a historical solution as already hinted by Pernice¹ seems at first sight to contradict the opinion expressed by the same Julianus in fr. 15, § 1:—

'Si servus vulneratus mortifere postea ruina vel naufragio vel alio ictu maturius perierit, de occiso agi non posse, sed quasi de vulnerato, sed si manumissus vel alienatus ex vulnere periit, quasi de occiso agi posse Julianus ait.'

Glück² has supposed that Julian changed his opinion, but this cannot be admitted, for, as Professor Ferrini justly observes, 'the latest critical studies on the use of the *fontes* in Paulus' *Commentarii* render it impossible: Ulpianus in writing fr. 15, § 1, as well as fr. 11, had before himself the same eighty-sixth of Julian's *Digesta*.' The real truth is that the case put in fr. 51, § 2 is quite different from that contemplated in fr. 15, § 1; the former of them supposes that a slave mortally wounded comes by his death owing to a second blow inflicted upon him by another; in the case of the latter we have a wound which would have caused death, but before this took place an unforeseen misfortune (*ruina vel naufragium*) puts an end to the wounded slave's existence. It suffices to remember the Roman ideas on fate and fortune to understand that the two cases would present themselves with quite different features to the Roman jurist. Contemplating the case considered in fr. 15, § 1, Julian maintained that the action ought to be *ex vulnerato*, for the *ruina* and *naufragium* were to him as something unavoidable, breaking the causal connection between the wound and the death. This having not taken place before the *ruina* is considered as if it never could have happened, and consequently the wounder cannot be held responsible on the ground that the death would have happened necessarily. Fr. 15, § 1 is then by no means in contradiction with fr. 51 pr.

It suits our purpose here to go back to the general principles regarding the *actiones legis Aquiliae*. Among the requirements for bringing an Aquilian action, one has a special interest in our case, namely the necessity on the part of the plaintiff to prove that the slave had been killed; in all cases considered by the first chapter of the *lex*, the plaintiff was obliged to prove that the slave had been killed; in all cases considered by the third chapter of it, that he

¹ Dr. Alfred Pernice, *Zur Lehre von den Sachbeschädigungen, nach Römischen Rechte*, Weimar, 1867, p. 181. Sonach lässt sich Julians Ansicht gerade bei Verwundungen eine Ausnahme von der sonstigen Regel zu machen, wol erklären. That Julianus started from the supposition that the first blow was deadly is also shown by Schol. 7, Bas. 7, 60 (5, 319): τοῦτό ἐστιν ἡ διαφορὰ τοῦ παρόντος κεφαλαίου πρὸς β' θέμα τοῦ 1^{ου} κεφαλαίου, ὅτι καὶ ἡ πρώτη πληγὴ οὐκ ἦν ἐξ ἀνάγκης θανάσιμος, ἀλλ' ἀμφίβολος, ἐνταῦθα δὲ ἡ πρώτη ἐξ ἀνάγκης ἐμῆλλε φονεῦσαι τὸν πληγόμενον, καὶ ἴσως μεθ' ἡμέραν.

² Ausführl. Erläut. x. 347.

³ Ferrini, op. cit. p. 250.

had been wounded. Let us examine now which actions might be brought by the owner of the dead slave in fr. 11, § 3.

According to the *communis opinio* the answer is very easy. He might have brought two actions, one against the wounder *de vulnerato* as soon as the slave had been wounded, a second one against the killer after the slave's death. This view is, as the prevalent one, accepted by Celsus, Marcellus and Ulpian. Julianus is the only jurist who did not accept it. He wanted to be a reformer in this point as he had been in many others. As we have already noticed he had maintained, against Celsus, that the period of time within which assessment of damage had to be made should be reckoned back from the moment of the blow; he went even further and assumed that the slave who had received a blow *qua certum esset peritulum* might be considered as dead by the owner, who was so entitled to bring an action *de occiso* whilst the slave was still alive. In other words, Julianus, as well as all other jurists, admitted in general the possibility of a deadly wound, and simply differed from them inasmuch as he assumed it as a sufficient condition for bringing an *actio de occiso*. Ulpian's words in fr. 15, § 1 :—

'Haec ita tam varie quia verum est eum a te occisum tunc cum vulnerabas, quod mortuo eo demum apparuit; at in superiore non est passa ruina apparere an sit occisus.'

comment on Julian's opinion with reference to the common opinion, and not according to the special view propounded by the compiler of the *Edictum Perpetuum*, which was rejected by Ulpian, Celsus and Marcellus (fr. 11, § 3, h. t.).

The attempt made by Julianus was certainly exposed to practical difficulties, though a very liberal one, but this does not make against our theory; on the contrary it confirms it, as we are told that the most part of jurists did not agree with Julianus. Besides it must not be overlooked that Julian's opinion was addressed to a very limited number of cases, for if the first wound was slight the question could not arise, if it had been deadly it would very seldom have been followed by another. But the most forcible arguments are textual; we cannot expose them more clearly than by translating Ferrini's account of them¹.

'Undoubtedly,' he says, 'Pernice's opinion may be supported by many exegetical arguments. The opinion manifested by Ulpian in fr. 11, § 3, belongs, as he expressly avows, to Celsus, from whom Marcellus borrowed it. Now it is known that Celsus very often entertained opinions opposite to those supported by Julianus, and that even in this matter the two great contemporaries were at variance (fr. 21, § 1, h. t.; D. IX, 4, 2, 1). Marcellus criticises

¹ op. cit. p. 249.

Julianus' opinions, and not only in his Notes to him, and tries to limit their efficacy (see e. g. fr. 27, § 3, h. t.). In composing fr. 11 Ulpianus had under his eyes Julianus' text preserved to us in fr. 51, h. t., and this is proved by the fact that the quotation from Julianus in fr. 11, § 2 corresponds to § 1 in fr. 51. Besides Julianus is quoted in all paragraphs of fr. 11, except the § 3 from which the question arises. The opinion maintained in this paragraph is attributed to Celsus and Marcellus, so it is very difficult to suppose that Julianus acceded to it, the more so considering that Ulpian's fragment, even in the form it has in the *Corpus Juris*, preserves vestiges of an ancient controversy:—

quod et Marcellus videtur ET EST PROBABILIS.

If the opinion adopted by Marcellus was the more probable, there must have been another opinion which Ulpian thought less probable. At least in reading fr. 51 pr. it is very easy to perceive that Julian was expounding a theory of his own, of which he tries to persuade the reader.

It is strange that after collecting so clearly the main arguments in favour of the prevalent opinion the clever Romanist should repel it. He is induced to disregard the arguments collected because of fr. 15, § 1; but, it being proved, as he himself admits, that in fr. 15 another case is considered, how can they be disregarded? Professor Ferrini's new theory is supported by arguments by far less convincing, and cannot be maintained against Pernice's any more than Grueber's earlier theory.

The two recent writers have then thrown no new light on the matter, and our opinion may still live prosperously in spite of the premature death knell¹.

G. PACCHIONI.

¹ The practical solution of the controversy is quite different from the scientific in regard to Justinian's compilation. The writers are generally inclined to accept Ulpian's opinion, but considering the progress of medicine in our age we think Julian's theory is to be preferred. See Castellari, *Arch. Giur.* xxii. p. 356 and following.

[I am not sufficiently versed in the Digest to have a decided opinion as to what Julianus was capable of. But I cannot help thinking that a Roman lawyer who held that an action would lie for killing a man before the man was dead would have seemed to his colleagues *capable de tout*; and, with all deference to specialists in Roman law, I submit that we ought to have stronger and less ambiguous evidence before we attribute such a view to any lawyer of the classical period.—EDITOR.]

THE CANADIAN CONSTITUTION¹.

THE Dominion of Canada consists of seven organized provinces, one organized district, and a vast extent of territory sparsely inhabited, and known as the North West Territories. The area and population of the different provinces vary very widely as the following table shows:—

	<i>Area in Square Miles.</i>	<i>Population.</i>
Ontario	101,731 ...	1,923,228
Quebec	188,688 ...	1,359,027
Nova Scotia	20,909 ...	440,572
New Brunswick	27,174 ...	321,233
Manitoba	123,200 ...	65,954
British Columbia	341,305 ...	49,459
Prince Edward's Island	2,133 ...	108,891
District of Keewatin	} ... 3,000,352 ...	56,446
North West Territories		
	<u>3,805,492</u>	<u>4,324,810</u>

The union of the Canadian Colonies in a federation was a favourite idea with individual statesmen from time to time. It was advocated by Lord Durham in the Durham Report. More than once the subject was debated in one or other of the legislatures, and in 1858 it was part of the policy of the Cartier-Macdonald administration, but it was not until 1861 that any definite steps were taken to carry the suggestion into practical effect. In that year the legislature of Nova Scotia passed a resolution in favour of the union of the maritime provinces. This resolution was transmitted to the Duke of Newcastle, then Secretary of State for the Colonies, and by him it was forwarded to the Governor-General and the Lieutenant-Governors of the other North American colonies. The Lieutenant-Governors communicated the resolution to their respective legislatures, and the legislature of each maritime province resolved that delegates should be appointed to confer with delegates of the other provinces, 'for the purpose of discussing the expediency of a union of the three provinces under one government and legislature.' Up to this point the important and leading colony of Canada had held aloof from the proposed union, but a few of the leading politicians fortunately saw that a union offered an opening from the deadlock that had occurred in party government in the colony. When Upper and Lower Canada

¹ A portion of a forthcoming work on 'The Canadian Constitution.'

were united in 1840, Lower Canada possessed the larger population, but in a few years, owing to constant immigration, the population of Upper Canada came to exceed that of Lower Canada by 250,000. A demand arose in the former province for a re-adjustment of representation in the legislature, and 'representation in proportion to population' became the important political question of the day. Parties at length became so balanced that from the 21st May, 1862, to the end of June, 1864, there were no less than five different ministries in office, and the efficient conduct of public business became impossible. In the meantime the Nova Scotia proposal had been communicated to the legislature, and on the defeat of the Taché-Macdonald ministry in 1864 overtures were made by the opposition to Sir John Macdonald, which resulted in the formation of a coalition ministry pledged to the adoption of a federal union of the colonies. Permission was asked and given to attend the meeting of the delegates of the maritime provinces, which was held soon after at Charlottetown.

The conference came to the conclusion that a union of the maritime provinces by themselves was impracticable, but that a union of all the colonies was possible and desirable. In order to discuss this wider issue a second conference met at Quebec on the 10th October, 1864. Twelve delegates were present from Canada, seven from New Brunswick, five from Nova Scotia, seven from Prince Edward's Island, and two from Newfoundland. After eighteen days' deliberations, 72 resolutions were agreed upon as the basis of union, the delegates undertaking to submit the resolutions to their respective legislatures, and to use every legitimate means to ensure the adoption of the scheme.

Early in the year 1865, the Canadian legislature expressed its approval of the Union by votes of 45 to 15 in the Council, and 91 to 33 in the Assembly. In New Brunswick the general election of 1865 resulted in the return of an Assembly hostile to the proposal. The Council in the following year declared for the Union: the ministry resigned and a general election followed, and the new Assembly adopted the scheme. The hostility of New Brunswick affected Nova Scotia, but in 1866 the Assembly adopted the Quebec resolutions by a large majority. Prince Edward's Island and Newfoundland declined to enter the Union.

Three provinces had now given their consent subject to certain modifications desired by the two maritime provinces. All differences were adjusted at a Conference held in London in Dec. 1866, and in Feb. 1867 Lord Carnarvon introduced a bill 'for the union of Canada, Nova Scotia, and New Brunswick and the government thereof and for purposes connected therewith.' The measure obtained

the support of all parties, and received the royal assent on the 29th March.

The Act authorized Her Majesty in Council to declare by proclamation that on and after a certain day the provinces of Canada, Nova Scotia, and New Brunswick should form one Dominion under the name of Canada. Such proclamation was issued on the 22nd May, 1867, and the 1st day of July of that year was fixed as the date from which the Union should take effect. The Act made provision for the admission of Prince Edward's Island, British Columbia, Newfoundland and the North West Territories into the Union. British Columbia was admitted by Order in Council, dated the 16th day of May, 1871, as from the 20th July, 1871. Prince Edward's Island was admitted by Order in Council dated the 26th June, 1873, as from the 1st day of July, 1873. The North West Territories were ceded to Canada by Order in Council, dated the 24th June, 1870. Some doubt existed as to the power of the Dominion Parliament to form new provinces out of these territories, and the Imperial Act, 34 & 35 Vict. c. 28, was passed to confer such power. A further Imperial Act (49 & 50 Vict. c. 35) was passed in 1886 to enable the Dominion to provide for the representation of territories not forming part of any province in the Senate and House of Commons of Canada. These last mentioned Acts have greatly increased the legislative powers of the Dominion. Under their provisions the new province of Manitoba was created in 1870, and provision has been made for the government of the North West Territories. Five districts have been organized in the Territories, viz. Keewatin, which has been placed under the Lieutenant-Governor of Manitoba and Assiniboia, Saskatchewan, Alberta, and Athabasca, forming that portion of the territories lying between Manitoba and British Columbia.

It is impossible in the limits of one article to give a detailed account of the Canadian Constitution. There is a popular impression that an adequate description of that Constitution can be found within the four corners of the Union Act of 1867, when as a matter of fact the student must gather his information from six different sources. (1) English Statute Law. Reference has already been made to important statutes relating to Canada and passed after 1867. (2) Canadian Statutes. The qualification of electors to the House of Commons, the qualification of members, the constitution of the North West Territories, the organization of the departments of state and the constitution of Courts of Justice are, for instance, regulated by Canadian Statutes. (3) Provincial Statutes. Though the leading features of the constitutions of Ontario and Quebec are found in the Act of Union, many details of the constitutions of the other provinces are only to be found in the Statutes of the Provinces,

e.g. the law relating to the franchise. (4) Imperial Orders in Council. The most important Imperial Orders in Council are those already referred to, admitting British Columbia, Prince Edward's Island, and the North West Territories into the Union. (5) Dominion and Provincial Orders in Council. These sometimes contain important regulations. The Government of the North West Territories is, subject to the provisions of the statute-law, carried on by a Lieutenant-Governor and Council, subject to Orders in Council issued by the Governor-General in Council. (6) Orders and rules of the Dominion Parliament and Provincial Legislatures. (7) Usages. These orders, rules and usages govern the procedure in the Dominion Parliament and the provincial legislatures from day to day, and regulate the method of legislation.

I. DISTRIBUTION OF LEGISLATIVE POWER.

The framers of the Canadian Constitution in distributing the legislative power have not followed the United States principle of reserving certain specific subjects to the central legislature, and leaving what remains to the provincial legislatures. Nor have they adopted the opposite principle of delegating specific subjects only to the provinces. Both methods have been partially followed, and an attempt has been made to enumerate the respective powers of the Dominion and the Province. The framework of the Act is briefly as follows. The Dominion Parliament has a general power to make laws for the peace, order, and good government of Canada, and certain subjects are in addition specifically assigned to it. This legislative power is limited in two ways: (1) by the indirect reservation of certain matters to the Imperial Parliament; and (2) by the powers assigned to the Provincial Legislatures. Whenever a dispute arises regarding the validity of a provincial Act, the first question the Court has to decide is this:—Does the subject-matter fall within any of the matters assigned to the provinces? If it does not, then the Act is *ultra vires*; but if it does, then this second question arises:—Whether the *prima facie* right of the province to pass the Act is not overborne by the powers given to the Dominion¹, or reserved indirectly to the Imperial Parliament?

That the whole sphere of legislation has not been surrendered by the Imperial Parliament is clear from the following restrictions on the legislative powers of the Dominion and the provinces:—

1. The Dominion has only a limited power of altering its Constitution². It cannot apparently abolish either of the Houses of

¹ *Citizens Insurance Co. v. Parsons*, 45 L. T. N. S. 721; *Bank of Toronto v. Lambe*, L. R. 12 App. Cas. 575.

² See *post*, p. 190.

Parliament, nor can it alter the number or qualification of senators, nor increase or diminish the number of representatives in the House of Commons except within narrow limits. A province has greater power in these respects than the Dominion.

2. After granting a constitution to a new province the Dominion Parliament cannot alter it¹.

3. No protective duties can be imposed as between the provinces².

4. Lands and public property belonging to Canada or the provinces cannot be taxed³.

5. Acts of the Parliament of Great Britain or of the Parliament of Great Britain and Ireland existing in any of the provinces at the time of the Union can only be repealed, abolished, or altered by Imperial legislation⁴.

6. The seat of the Government can be changed only by Her Majesty⁵.

In the British North America Act 1867, little attempt has been made to classify the powers of the Dominion and Provincial Legislatures respectively. The 91st and 92nd sections contain the attempted enumeration of the chief subjects of legislation. The former section relates to the Dominion, and begins with a general clause, 'it shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces,' and then 'for greater certainty, but not so as to restrict the generality' of the clause just set out, proceeds to enumerate twenty-nine classes of subjects over which the Dominion is to have 'exclusive authority.' The 92nd section, after enumerating fifteen classes of subjects over which the legislature of a province is to have exclusive authority, ends with a general clause giving to a province legislative power over 'generally all matters of a merely local or private nature in the province.' Several of the other sections of the Act, e. g. 41, 65, 93, 94, 95, 101, contain very important provisions regarding legislative powers, and since 1867 three important Imperial Acts⁶ have been passed, increasing the legislative powers of the Dominion.

The various powers may be conveniently classified under 17 heads, viz. (1) Amendment of the Constitution; (2) Extension and Formation of Provinces; (3) Treaties; (4) Public Property; (5) Public Debt and Taxation; (6) State Management and Admin-

¹ 34 Vict. c. 28, s. 2.

² B. N. A. Act 1867, s. 121.

³ *Ib.* s. 125.

⁴ *Ib.* s. 129.

⁵ *Ib.* s. 16.

⁶ 34 & 35 Vict. c. 28; 38 & 39 Vict. c. 38; 49 & 50 Vict. c. 35.

istration; (7) Administration of Justice; (8) Status; (9) Education; (10) Property and Civil Rights; (11) Trade and Commerce; (12) Monopolies; (13) Money and Banking; (14) Agriculture; (15) Immigration; (16) Local Affairs; (17) Alteration of laws existing at the time of the Union.

1. *Powers relating to the Constitution.*

The Dominion has no control over the office of Governor-General, though his salary is borne by Canada. The Lieutenant-Governors are appointed by the Governor-General on the advice of his ministers, and are removable by him on like advice¹. The Parliament may provide for the representation of new provinces², and of territories not within a province³ in the Senate, and fix the number of senators requisite to form a quorum⁴.

As regards the House of Commons the Dominion has power to legislate on the distribution of seats, the qualifications and disqualifications of members, the voters at elections, the oaths to be taken by voters, the powers and duties of returning officers, the proceedings at elections, the trial of election petitions, the vacating of seats, and the execution of writs for new elections. It may make provision for the absence of the Speaker, and subject to the conditions laid down by the Act it may adjust the representation after every decennial census.

A province has a general power to amend its constitution, except as regards the office of Lieutenant-Governor⁵. The effect of this provision is that a provincial legislature has not only similar powers to those enumerated above as belonging to the Dominion, but it may, in case the legislature consists of two houses, abolish either house. The powers of the provincial legislature are however limited by several provisions in the Act of Union. For instance, the provisions relating to Appropriation and Tax Bills, the recommendation of money votes, the assent to bills, and the disallowance of Acts⁶, are binding on all the provincial legislatures, and cannot be altered except by the Imperial Parliament. Apart from the abolition of either house, the power of amending the constitution practically gives the provinces the right of determining the number, qualification, and election of members of the legislature.

By the 38 & 39 Vict. c. 38, the Imperial Parliament authorized the Dominion Parliament to define by Act the privileges to be enjoyed by the Senate and House of Commons, and by the members thereof, provided such privileges did not exceed those enjoyed by

¹ B. N. A. Act, s. 92; *The Letellier Case*, Todd p. 405.

² 34 & 35 Vict. c. 28.

³ 49 & 50 Vict. c. 35.

⁴ B. N. A. Act 1867, s. 35.

⁵ *Ib.* s. 92 (1).

⁶ *Ib.* s. 90.

the House of Commons in England at the passing of such Act. No reference was expressly made in the Union Act to the privileges of the Provincial Legislatures, and when Ontario in the Session 1868-9 passed an Act conferring on its Legislative Assembly the same privileges as were enjoyed by the Dominion House of Commons, the validity of the Act was doubted. The opinion of the law officers of the Crown in England was then taken, and as they held that the Act was *ultra vires*, it was disallowed. The view of the English law officers did not meet with general support, and when Quebec in 1870, British Columbia in 1871, and Ontario in 1876 passed similar Acts, they were allowed to come into operation. The provisions of the Quebec Act regarding the summoning of witnesses came before the Courts in *Ex parte Dansereau*¹, and the appeal side of the Quebec Court of Queen's Bench held that a power of summoning witnesses was necessarily incident to the powers of a legislature, and that a provincial legislature had 'a right to exercise such powers and privileges as were mere incidents of the powers specifically vested in them, and without which they could not probably exercise the duties devolving upon them.' In *Landers v. Woodworth*², the Supreme Court of Canada held that in the absence of express legislation the Legislative Assembly of Nova Scotia had no power to remove one of its members for contempt unless he was actually obstructing the business of the House. It would therefore seem (1) that a provincial legislature has apart from provincial legislation those implied powers and privileges which are absolutely essential for the discharge of its duties; and (2) that any other privileges cannot be enjoyed or exercised in the absence of legislation. The validity of such legislation might be supported on one of two grounds, viz. (1) the power of amending a provincial constitution, a view taken by Sanborn, J. in *Ex parte Dansereau*; (2) the powers possessed by each province at the time of the Union, inasmuch as the Union Act has not taken away all of such powers.

2. Extension and formation of Provinces.

The Dominion Parliament may (1) extend the limits of a province with the consent of the legislature of such province³; (2) establish new provinces and provide for the constitution and administration of such provinces; and⁴ (3) provide for the government of any territory not within the limits of any province. Under this last-mentioned power provision has been made for the government of the North West Territories.

¹ 19 L. C. Jurist 210; 2 Cart. 165.

³ 34 Vict. c. 28.

² Can. S. C. R. 158; 2 Cart. 220.

⁴ *Ib.*

3. *Treaties.*

No treaty-making power has been conferred on the Dominion, but the Canadian Parliament may exercise all powers necessary for performing the obligations of Canada, or of any province thereof as part of the British Empire, towards foreign countries arising under treaties between the empire and such foreign countries¹.

4. *Public Property.*

'The Public Property' of the Dominion is placed under the Dominion Parliament, whilst a provincial legislature has 'the management and sale of the public lands belonging to the province and of the timber and wood thereon².' Under the head of provincial property is included the banks and beds of rivers³.

5. *Public Debt and Taxation.*

(a) The Public Debt of Canada is under the jurisdiction of the Dominion⁴. The Dominion may borrow on the 'public credit⁵,' and a province on the 'sole credit of the province⁶.'

(b) Direct Taxation within the province, for the purpose of raising a revenue for provincial purposes, is the exclusive function of a province. The meaning of 'direct' taxation was discussed in *A. G. for Quebec v. Queen Insurance Company*⁷, and in the more recent case of *The Bank of Toronto v. Lambe*⁸. In the former case a Quebec Act requiring insurance offices other than marine offices to take out a licence in every year, and pay for such licence by an adhesive stamp affixed to every policy or receipt, was held *ultra vires* inasmuch as it was in reality a Stamp Act, and therefore imposed an indirect tax. In the latter case a Quebec Act imposing a tax on banks varying in proportion to the paid up capital, and on Insurance Companies based on a sum specified in the Act, was held to be valid on the ground that the Act was designed to impose the tax finally on the Corporations who had to pay it, though it was possible that the Corporations might circuitously recoup themselves out of the pockets of their customers. The tax need not necessarily be for general provincial purposes⁹, and it is immaterial that the persons taxed are not domiciled in the province¹⁰.

One restriction exists on the power of a province to impose direct taxation: it cannot tax the income of Dominion officers residing in the province. To do so would be to lower the salaries

¹ R. N. A. Act, s. 132.² *Ib.* s. 92 (5).³ *R. v. Robertson*, 6 C. S. C. 52.⁴ B. N. A. Act, s. 91 (1).⁵ *Ib.* s. 91 (4).⁶ *Ib.* 92 (3).⁷ 16 C. L. J. N. S. 198; L. R. 3 App. Ca. 1090.⁸ L. R. 12 App. Ca. 575.⁹ *Doe v. Black*, L. R. 6 P. C. 272.¹⁰ *Bank of Toronto v. Lambe*, *supra*.

of such officers, and by section 91 (8) of the Union Act the Dominion has the sole power of regulating the salaries of its officials¹.

(c) Indirect Taxation. The Provinces are authorized to impose 'shop, saloon, tavern, auctioneer, and other licences, in order to the raising of a revenue for provincial, local, or municipal purposes².' All other indirect taxes can be levied by the Dominion alone, subject to the condition that no protective duty be levied as between provinces³. The powers of a province to impose the above licences are extended by the powers referred to afterwards to regulate 'municipal institutions,' as the maintenance of order in towns, and the prevention of intemperance imply restrictions on the sale of liquors which may be best affected by licences. The raising of taxes by means of licences is a limitation of the Dominion right of legislating on 'trade and commerce.'

6. *State Management and Administration.*

Under this head may be classified the following matters:

i. Public Safety. The Dominion has sole jurisdiction in matters relating to (a) the Militia, Military and Naval Service and Defence⁴,

(b) Quarantine.

ii. Public Works and Means of Communication.

To the Dominion is assigned:

(a) The Postal Service⁵.

(b) Navigation and Shipping⁶.

(c) Ferries between a province and any British or foreign country, or between two provinces⁷.

(d) Lines of Steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting a province with any other province, or extending beyond the limits of a province⁸.

(e) Lines of steamships between the province and any British or foreign country⁹.

(f) Such works as, although wholly situate within a province, are before or after their execution declared by the Parliament of Canada to be for the advantage of two or more provinces¹⁰.

The Provinces, on the other hand, have legislative jurisdiction over 'local works and undertakings,' not coming within the last three classes¹¹.

(g) The establishment and maintenance of marine hospitals are assigned to the Dominion; all other kinds of hospitals, as well as

¹ *Leprohon v. City of Ottawa*, 2 Ont. App. R. 522.

² B. N. A. Act, s. 92 (9).

³ *Ib.* s. 125.

⁴ *Ib.* s. 91 (7).

⁵ *Ib.* s. 91 (5).

⁶ *Ib.* s. 91 (10).

⁷ *Ib.* s. 91 (13).

⁸ *Ib.* s. 92 (10).

⁹ *Ib.*

¹⁰ *Ib.*

¹¹ *Ib.*

asylums and charities for a province, are placed under the province¹.

iii. Matters of State Management.

The Dominion has sole jurisdiction over :

(a) The sea coast².

(b) Beacons, buoys, lighthouses, and Sable island³.

(c) Inland Fisheries. As regards fisheries, the Dominion powers do not extend over the bed of a river, nor can they affect the rights of individuals therein. They are limited to the regulation, protection, and preservation of fisheries, and therefore the grant of a right to fish in a provincial river was held invalid⁴.

(a) The Census⁵.

(b) Statistics⁶.

(c) Weights and measures⁷.

iv. The Civil Service. The Dominion and the Provinces may pass laws necessary for carrying on the administration and departments of State within the Dominion and the Provinces respectively. Several sections of the Union Act refer to the Dominion Civil Service. The Dominion may

(a) Fix and provide for the salaries of the Governor-General and the Lieutenant-Governors⁸.

(b) Fix and provide the salaries and allowances of civil and other officers of the Government⁹.

(c) Fix and provide the salaries, allowances, and pensions of the Judges of the Superior, District, and County Courts (except the courts of probate in Nova Scotia and New Brunswick), and of Admiralty Courts in cases where the Judges are paid by salary¹⁰.

To the Provinces is given the legislative powers regarding 'the establishment and tenure of provincial officers and the appointment and payment of provincial officers¹¹.'

7. *The Administration of Justice.*

The relations of the Dominion and the Provinces to the administration of justice may be considered under the heads of (1) the constitution and procedure of Courts, (2) the appointment of Judges, (3) Criminal Law, (4) Prisons.

i. The constitution, maintenance, and organization of Civil Courts, including procedure in civil matters, in a province is assigned to the province¹² subject to following Dominion powers.

(a) The Dominion may constitute, maintain and organize a general Court of Appeal for Canada, and establish any additional

¹ B. N. A. Act, s. 91 (11) and s. 92 (7).

² *R. v. Robertson*, 6 Can. S. C. R. 52.

³ *Ib.* s. 91 (17).

⁴ *Ib.* ss. 60, 105.

⁵ *Ib.* s. 92 (4).

⁶ *Ib.* s. 92 (14).

⁷ *Ib.* s. 91 (12).

⁸ B. N. A. Act, s. 91 (6).

⁹ *Ib.* s. 91.

¹⁰ *Ib.* s. 91 (9).

¹¹ *Ib.*

¹² *Ib.* s. 100.

courts for the better administration of the laws of Canada¹. Under this section an Exchequer Court and a Supreme Court for the whole dominion were established in 1875, and in 1877 a Court of Maritime Jurisdiction was established in Ontario.

(b) The Dominion is empowered to establish a court for the trial of election petitions², and in 1874 the then existing Supreme Provincial Courts were authorized to try election petitions in connection with the election of members of the Canadian House of Commons.

The constitution of courts of criminal jurisdiction, including criminal procedure, is vested in the Dominion³, subject to the limitation that in so far as a province is invested with the power to make penal laws referred to below, it has an implied power to regulate the procedure for enforcing such laws⁴.

ii. The Governor-General appoints Judges of the Superior, District, and County Courts in the Provinces. For inferior Courts, the right of appointment belongs to the Province⁵, but a Lieutenant-Governor cannot, in the absence of a statutory power, appoint justices of the peace, inasmuch as he is not, like the Governor-General, authorized to exercise that prerogative of the Crown.

iii. 'Criminal Law, except the constitution of courts of criminal jurisdiction, but including procedure in criminal matters,' belongs to the Dominion, subject to the following limitation:

'The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter arising within any of the classes of subjects enumerated in section 92,' is vested in a province⁶. A limited criminal jurisdiction is thus given to the provinces. This jurisdiction cannot be used to enforce a law of the province by declaring Acts to be offences, which are already offences by the Criminal Law of the Dominion. An attempt was made in one case⁷, similar to that made in some English cases⁸, to distinguish between acts called offences, viz. those punishable by magistrates, and acts called crimes, viz. those punishable on indictment, and it was suggested that the former acts were within provincial jurisdiction, but the decision was not based on such a distinction. It is in regard to temperance legislation that the most important questions have arisen as to the criminal jurisdiction of the Provinces.

iv. Prisons. The establishment, maintenance and management of penitentiaries or prisons, are powers that can be exercised by both the Dominion and the Provinces⁹.

¹ B. N. A. Act, s. 101.

² *Ib.* s. 41.

³ *Ib.* s. 91 (27).

⁴ *Pope v. Griffith*, 16 L. C. Jurist 169. ⁵ B. N. A. Act, ss. 92 (14), 96.

⁶ *Ib.* s. 92 (16).

⁷ *R. v. Lawrence*, 43 U. C. Q. B. 164.

⁸ See remarks of Martin B. in *A. G. v. Radloff*, 10 Ex. p. 96.

⁹ B. N. A. Act, ss. 91 (28), 92 (6).

8. *Status.*

Naturalisation, aliens, Indians and Indian lands reserved for the use of Indians are within Dominion jurisdiction¹. So too is marriage and divorce, except that laws relating to the solemnisation of marriage within a province are to be made by such province².

9. *Education.*

In every province the legislature may make laws in relation to education, subject to the following conditions:

(a) The rights and privileges enjoyed by denominational schools at the time of the Union are not to be prejudicially affected.

(b) The powers and privileges enjoyed by Roman Catholic Schools in Upper Canada are extended to the dissentient schools of Protestants and Roman Catholics in Quebec.

(c) An appeal lies to the Governor-General in Council against any provincial act or decision affecting any right of the Protestant or Roman Catholic minority in any province where a system of separate or dissentient schools is established.

In case any provincial law requisite in the opinion of the Governor-General in Council for carrying out the above provisions is not made, or in case the decision of the Governor-General in Council in any appeal under the section is not duly executed, the Parliament of Canada may pass any laws requisite for carrying out the above provisions or the decision of the Governor-General on any such appeal.

10. *Property and Civil Rights.*

'Property and Civil Rights in the Province' are assigned to the Provinces³, and 'bankruptcy and insolvency' to the Dominion⁴.

The jurisdiction of a province over property and civil rights within its limits is absolute, and therefore the Ontario legislature was held to be within its powers when it passed an Act dividing a testator's property in a way different to that provided by his will. Property includes property in fisheries, and a province may regulate the transfer of rights in fisheries. In 1881 the important question arose whether a debt belonging to a person domiciled elsewhere could be said to fall within 'property and civil rights in the province,' in view of the acknowledged rule that the locality of a debt is determined by the domicile of the creditor. The Ontario Court of Queen's Bench declined to limit the clause, and held that debts

¹ B. N. A. Act, s. 91 (24), (25).

² *Ib.* s. 92 (13).

³ *Ib.* ss. 91 (26), 92 (12).

⁴ *Ib.* s. 91 (21).

contracted under a provincial Act could be dealt with by the legislature irrespective of the domicile of the creditor¹.

Some of the specific subjects assigned to the Dominion relate to Property and Civil Rights, such as Bankruptcy and Insolvency, Patents, Copyright, and Indian lands. Perhaps the most important of these limitations is that relating to Bankruptcy and Insolvency. The meaning of these words was discussed in *L'Union St. Jacques v. Bélisle*², where it was held that they referred to general legislation on the subject. 'The words describe in their known legal sense provision made by law for the administration of the estates of persons who may become bankrupt or insolvent according to rules and definitions prescribed by law, including, of course, the conditions under which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation.' Hence when the Dominion passed an Act relating to the liquidation of building societies in Quebec, and not applying to the whole Dominion, it was held *ultra vires*³.

11. Trade and Commerce.

'The regulation of trade and commerce' belongs to the Dominion. The difficulty of defining these words was admitted by the Judicial Committee of the Privy Council in the *Citizens Insurance Company v. Parsons*⁴. The words it was said 'would include political arrangements, in regard to trade requiring the sanction of parliament, the regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulations of trade affecting the whole dominion,' but it was added 'their lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament.' They decided however that the Dominion had not power to regulate the contracts of a particular trade, such as the business of fire insurance, in a single province. The powers of the Dominion Parliament in regard to trade are limited by the implied power that the provinces have of passing laws necessary to give effect to the powers of legislation expressly conferred on them. For instance, the regulation of 'municipal institutions' enables a province to prohibit the sale of articles in the street⁵, and the power to deal with 'local matters' was held to justify a Quebec Act, imposing qualifications on persons engaged in selling drugs and medicines⁶.

¹ *Nickle v. Douglass*, 35 U. C. Q. B. 126; 37 U. C. Q. B. 51.

² L. R. 6 P. C. 31.

³ *McClanaghan v. St. Anne's Society*, 24 L. C. J. 162.

⁴ L. R. 7 App. Ca. p. 112.

⁵ *Re Harris and the Corporation of the City of Hamilton*, 44 U. C. Q. B. 641.

⁶ *Bennett v. Pharmaceutical Association of Quebec*, 1 Derons Q. App. 336.

12. *Monopolies.*

To the Dominion is assigned:

- (a) Patents of Invention and Discovery¹.
- (b) Copyrights².
- (c) The incorporation of banks³.

Excepting banks a province may incorporate any company 'with provincial objects.'

13. *Money and Banking.*

The Dominion has assigned to it:

- (a) Currency and Coinage⁴.
- (b) Issue of paper money⁵.
- (c) Legal tender⁶.
- (d) Bills of Exchange and Promissory Notes⁷.
- (e) Banking and Incorporation of Banks⁸.
- (f) Savings banks⁹.
- (g) Interest¹⁰.

14. *Agriculture.*15. *Immigration.*

As regards agriculture in and immigration into a province, concurrent powers of legislation have been conferred on the Dominion and the Provinces, subject to the condition that a provincial law on either subject is only to be in force in so far as it is not repugnant to any Dominion Act¹¹.

16. *Local Matters.*

The Provinces have exclusive jurisdiction in

- 1. 'Municipal institutions in the province'¹².
- 2. 'Generally all matters of a merely local or private nature in the province'¹³.

But it is provided that matters assigned to the Dominion by section 92 are not to be deemed local matters in any province. The efforts of several provinces to regulate the liquor traffic by Act of the legislature, were questioned on the ground that all such Acts were illegal, as they constituted an interference with 'trade;' but in *Hodge v. The Queen*¹⁴ the validity of such Acts was upheld on the ground that they related to municipal or local matters and were in the nature of police regulations. In another case¹⁵ a New Brunswick Act authorizing the inhabitants of a parish within the province to raise a subsidy by local taxation for the

¹ R. N. A. Act, s. 91 (22).

² *Ib.* s. 91 (23).

³ *Ib.* s. 92 (11).

⁴ *Ib.* s. 91 (14).

⁵ *Ib.* s. 91 (15).

⁶ *Ib.* s. 91 (20).

⁷ *Ib.* s. 91 (18).

⁸ *Ib.* s. 91 (15).

⁹ *Ib.* s. 91 (19).

¹⁰ *Ib.*

¹¹ *Ib.* s. 95.

¹² *Ib.* s. 92 (8).

¹³ *Ib.* s. 92 (16).

¹⁴ L. R. 9 App. Ca. 117.

¹⁵ *Dow v. Black*, L. R. 6 P. C. 272.

construction of a railway was a 'local' matter, even though the railway was to be continued beyond the province.

17. *Alteration of Laws existing at the time of the Union.*

Laws existing at the time of the Union can be altered by the Dominion or the Provinces, according as the subject-matter falls within the classes of subjects assigned to the Dominion or the Provinces by the Union Act, subject to the proviso that Acts of the Imperial Parliament existing in 1867 and applying to the Provinces can only be altered by such Parliament.

This brief survey of the distribution of legislative power between the Dominion and the Provinces would be incomplete were attention not called to the important principle involved in the general words used at the beginning of section 91, and already quoted, viz. that if any matter does not fall within any of the classes of subjects assigned exclusively to the provincial legislatures, and has not been reserved directly or indirectly to the Imperial Parliament, then the Dominion Parliament may legislate in regard thereto under the general power 'to make laws for the peace, order, and good government of Canada.' This principle was applied in *Russell v. The Queen*¹, when the validity of a temperance law of the Dominion was upheld.

The validity of a Dominion or Provincial Act can always be raised in any Court of Law, an appeal lying ultimately by grace if not of right to the Judicial Committee of the Privy Council.

II. CONTROL OF THE PROVINCES BY THE DOMINION.

The Governor-General and Privy Council or Ministry of the Dominion have within very definite limits a certain degree of control over the Provincial Administrations and Legislatures.

1. The Lieutenant-Governors are appointed and are removable by the Governor-General acting on the advice of his ministers. The Lieutenant-Governor is therefore a Dominion officer, and is responsible to the Dominion Government for the proper discharge of his duties. The Dominion ministry is in turn responsible to the House of Commons, and in this way the House can control the conduct of the Lieutenant-Governors. The circumstances under which Lieutenant-Governor Letellier dismissed his ministers in 1878 in Quebec resulted in a demand being made for his dismissal. The Governor-General communicated the papers on the question to Parliament, and eventually both Houses agreed in censuring the

¹ 46 L. T. N. S. 889.

action of the Lieutenant-Governor. The ministry thereupon advised his dismissal, but the Governor-General being in doubt as to what course he should take, the whole matter was referred to the Home Government. The Colonial Secretary in a despatch dated the 3rd July, 1879, informed the Governor-General that Her Majesty's Government could not find anything in the circumstances to justify him in declining to follow the decided and sustained opinion of his ministers. The Lieutenant-Governor was accordingly removed.

2. As regards the provincial legislatures every Act passed must be transmitted to the Governor-General who may within one year disallow the same¹. All Acts are referred by the Governor-General to the Minister of Justice for report. In such report Acts are usually classified

a. As being altogether illegal or unconstitutional.

b. As illegal or unconstitutional in part.

c. In cases of concurrent jurisdiction, as clashing with the legislation of the Dominion.

d. As affecting the interests of the Dominion generally².

'Where a measure is considered only partially defective, or where objectionable as being prejudicial to the general interests of the Dominion, or as clashing with its legislation, communication should be had with the Provincial Government with respect to such a measure, and that in such a case the Act should not be disallowed if the general interest permit such a course until the local government has an opportunity of considering and discussing the objection taken, and the local legislature has also an opportunity of remedying the objects found to exist³.' The above extract taken from the paper drawn up in 1868 by Sir John Macdonald, Minister of Justice, and approved by the Privy Council of Canada, indicates the course which has since been followed in regard to provincial legislation. The report of the Minister of Justice after being approved of by the Council is presented to the Governor-General, who acts in accordance with its recommendations. The power of disallowance has been sparingly used. Mr. Burinot states that out of 6000 provincial Acts passed up to 1882, only 33 had been disallowed. From 1883 to 1887 inclusive only fifteen Acts have been disallowed. Some of these Acts were however disallowed on the 4th ground mentioned above, viz. as contravening the general railway policy of the Dominion as embodied in the contract with the Canadian Pacific Railway. By that contract the Dominion undertook that for 20 years from the date thereof, no railway should be allowed to be made 'south of the Canadian Pacific Railway from any point at or near the Canadian

¹ B. N. A. Act, s. 90.

² Report of Sir J. Macdonald, Can. Sess. Papers, 1869, No. 18.

³ *Ib.*

Pacific Railway, except such line as should run south-west, or to the westward of south-west: nor to within fifteen miles of latitude 49°.' The disallowance of the Manitoba Railway Acts has resulted in an unsuccessful attempt to construct a railway, notwithstanding the disallowance, and in a demand that provincial Acts shall not be vetoed so long as they are within the competence of the Provincial legislatures. In reporting to the Governor-General on the Manitoba Acts of 1885, the Committee of the Privy Council say 'the Committee whilst concurring in the report of the Minister of Justice, and humbly advising your Excellency to disallow each and every of the said Acts, desire to record the expression of their constant anxiety that the action of the legislatures of the several provinces of the Dominion should be interfered with under the power of disallowance reserved to your Excellency in Council by the B. N. A. Act, 1867, as little as possible: but that as in the case of these Acts the declared policy of Parliament adopted for the common weal is set at nought, and local legislation enacted leading indirectly, and directly too, to its frustration, the Committee of the Privy Council conceive that they are compelled by their duty to Parliament humbly to advise your Excellency to use the power in question ¹.'

III. IMPERIAL CONTROL OVER CANADA.

The Imperial control over the Dominion and the Provinces may be considered under several heads.

1. As already pointed out, the legislative powers of the Dominion and the Provinces do not exhaust the whole sphere of legislation, as several matters are reserved to the Imperial Parliament.

2. The Imperial Parliament has a concurrent legislative power in regard to all matters within the legislative jurisdiction of the Dominion or the Provinces. It was admitted, said Hagarty C.J. in *R. v. College of Physicians and Surgeons, Ontario*², 'as of course was necessary with the Federation Act before us, that if the Imperial Parliament distinctly legislate for us, they can do so notwithstanding any previous enactment or alleged surrender of the power of exclusive legislation on any subject.' An attempt was made in the case to show that by the word 'exclusive' used in the 91st and 92nd sections, the Imperial Parliament had undertaken not to legislate on the matters enumerated, but the Court held that 'exclusive' as applied to the Dominion powers meant 'exclusive of the Provinces,' and as applied to the Provincial powers, 'exclusive of the Dominion.' Since the Union, at least twenty-seven Acts have been passed by our own Parliament relating to Canada, the

¹ Can. Sens. Papers, 1885, No. 29.

² 44 U. C. Q. B. 564.

latest being the Copyright Act, 49 & 50 Vict. c. 33; the Medical Act 1886, 49 & 50 Vict. c. 48, and the Submarine Telegraphs Act, 50 Vict. c. 3.

3. By the Act to remove doubt as to the validity of Colonial laws (28 & 29 Vict. c. 63) any Colonial law repugnant to any Act of the Imperial Parliament extending to the Colony to which such law relates, is to the extent of such repugnancy void. This statute was applied in 1881 by the Quebec Vice-Admiralty Court in the case of *The Farewell*¹, when effect was given to the Dominion Pilotage Act 1873, so far as it did not conflict with the Merchant Shipping Act 1854.

4. The Governor-General may reserve a bill for the signification of Her Majesty's pleasure, and if he assents to a bill he is required to transmit such bill to a Secretary of State. Any bill may be disallowed by the Queen in Council within two years after its receipt. Between 1867 and 1878 the Governor-Generals under their instructions reserved twenty bills, of which eleven related to divorce, and received the royal assent. One was a copyright bill, and was disallowed in 1872 as conflicting with Imperial legislation; two were extradition bills, and were disallowed; and one was a merchant shipping bill, also disallowed. In the revised instructions issued in 1878, the clauses relating to the reservation of bills were omitted, as it was thought undesirable that they should contain anything which could be interpreted as limiting or defining the legislative powers conferred by the Union Act². Since 1878 no bill has been reserved, though the Governor-General has statutory power to take such a course³.

5. The Crown has no power of vetoing a provincial bill. The Governor-General may communicate with the Home Government in regard to the disallowance of provincial bills. This course was adopted when the Ontario Legislature passed an Act defining its privileges. The opinion of the law officers of the Crown was taken, and in consequence the Act was disallowed⁴.

Attempts have been made more than once by interested parties to obtain the interference of the Imperial Government in provincial legislation, but without success. An effort was even made by the Dominion House of Commons to obtain a declaration from the English Privy Council, on the validity of an Act of New Brunswick, but the Lord President of the Council declined to interfere on the ground that the confirming or disallowing of Provincial Acts is by law vested absolutely and exclusively in the Governor-General⁵.

¹ 7 Quebec L. R. 380.

² B. N. A. Act, 1867, s. 55.

³ Can. Sess. Papers, 1877, No. 89.

⁴ Can. Sess. Papers, 1877, No. 3.

⁵ Todd's Parl. Gov. p. 365.

6. The Governor-General is appointed by the Imperial Government, and to the Imperial Government he is responsible. Whilst he is expected to act in all Canadian matters on the advice of his ministers, it is his duty where Imperial interests are concerned to exercise if necessary an independent judgment. It is always open to him to seek advice from the Home Government, and the Home Government has the power (not likely to be used) of issuing formal instructions for his guidance.

It only remains to point out the provisions that have been made for enforcing the judgments or orders of the Supreme Court of Canada in the Provinces. By section 105 of the Revised Statutes of Canada (49 Vict. c. 135) it is enacted that 'the process of the Supreme Court and the process of the Exchequer Court shall run throughout Canada and shall be tested in the name of the Chief Justice, or in case of the vacancy in the office of Chief Justice in the name of the senior puisne judge of the Court, and shall be directed to the sheriff of any county or other judicial division into which any province is divided: and the sheriffs of the said respective counties or divisions shall be deemed and taken to be *ex officio* officers of the Supreme and Exchequer Courts respectively, and shall perform the duties and functions of sheriffs in connection with the said Courts, and in any case where the sheriff is disqualified such process shall be directed to any of the coroners of the county or district.'

J. E. C. MUNRO.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The Trial of Muluk Chand for the Murder of his own Child: a Romance of Criminal Administration in Bengal. With an Introduction by W. A. HUNTER, M. P. London: T. Fisher Unwin. 1888. 8vo. vi and 96 pp.

THE facts of this case are as follows:—Muluk Chand was a village watchman and cultivator, residing in the village of Bhulat, in the Bongong subdivision of the Nuddea district, not a hundred miles from Calcutta. He had, amongst other children, two little girls, named Nekjan and Golak Mani, aged about nine and seven years respectively. One night in March 1882, Muluk Chand and these two little girls were sleeping on the verandah of his homestead, his wife, with two other younger children, having gone to a neighbouring village for some money the evening before, and stayed there for the night. Near the verandah, on which the father and his little girls slept, were some vegetables growing in a patch of cultivated ground, and a strange bull had often come at night to eat them. Muluk Chand, having suffered from the predatory visits of this animal, was on the watch for him; and in order to drive him off kept beside his bed on the verandah a log of wood, which formed part of the rude machine with which the rice was husked for the use of the family. On the night of the occurrence, which was dark and cloudy, Muluk Chand heard what he supposed to be the approach of the bull to the vegetables, and in order to frighten him away threw the log of wood in the direction from which the sound came. He was at once, however, apprised by the cry of his child Nekjan that the log of wood had struck her. She had gone down off the verandah to attend a call of nature (such are the primitive habits of these people), and the sound heard by Muluk Chand was made by her and not by the bull. The log of wood had struck the child on the back between the shoulders, and the blow proved almost immediately fatal. The Bengalee peasant is usually most fond of his offspring, and the unhappy father was distracted at the unfortunate accident through which his own hand had deprived his child of life. But grief was soon overborne by other considerations. Muluk Chand, being a village watchman and so affiliated to the regular police, well knew that sudden and unnatural deaths must be reported at the nearest police-station; that the death of his child must therefore be so reported; and that the officer in charge of the police-station would thereupon come to hold an inquest. He knew what this would involve—knew it well, as an underling who had doubtless been present on many occasions when a police-officer, attended by a number of constables and village watchmen, had gone to inquire into a sudden or unnatural death, and they were all fed and feasted by the unfortunate householder in whose habitation the visitation had taken place: and the officer, unless a present were forthcoming, commensurate with his rank and the possible gravity of the case, saw circumstances of

suspicion which necessitated the forwardal of the householder to the headquarters of the district, entailing absence from home and family and the expenses of employing *mukhtars* or attorneys, even if no worse consequences followed. Muluk Chand therefore determined to conceal the fact that the child had met her death by his hand, fearing that, unless he could pay a large sum to the police, the idea of accident would be scouted and intentional injury would be charged against him. His brother-in-law advised him to represent that the child had died of snake-bite; and, in order to give colour to this story, slightly punctured the abdomen of the little corpse to make it appear that a snake had bitten her in a vital part.

The death of the child was accordingly reported at the police-station as caused by the bite of a snake. A police officer came and made an inquiry, and forwarded the body for examination by a medical officer. This examination was conducted in a very perfunctory manner by a native hospital assistant, who, finding a punctured wound on the abdomen, jumped at the conclusion that this was the cause of death and that the child had been murdered. The *post mortem* examination did not extend to a careful inspection of the other parts of the body, as it should have done.

The case being then one of murder in the opinion of an hospital assistant possessed of little knowledge and exhibiting less care in the performance of his duties, the police set about finding the murderer, and at once pitched upon Muluk Chand. Two things were wanting, however, to support the theory of his guilt, namely, a motive for the crime, and evidence to prove its commission by him. Muluk Chand was at enmity with one Kadam Ali Fakir, who had brought a criminal charge against him, and it was for money to enable him to defend himself against this charge that Muluk Chand's wife had gone to a neighbouring village the previous evening. What could be more natural than that Muluk Chand would kill his own child for the purpose of charging his enemy, Kadam Ali Fakir, with her murder? Here was a motive at once. Then the little difficulty about evidence was got over by tutoring the little girl Golak Mani, who was sleeping with her sister on the verandah, to say that she had seen her father put his foot on this sister's throat and thrust a spear into her abdomen. Muluk Chand was accordingly committed to the Sessions on the charge of murdering his own child. The Sessions judge summed up for a conviction, dwelling strongly upon the motive 'indicated' (there was no evidence of it) by the prosecution. The man was convicted and sentenced to death. Happily, however, by the law of India such a sentence passed by a Sessions judge cannot be carried out until it is confirmed by the High Court, to which tribunal the condemned man has also the right of appeal. Public opinion was opposed to the verdict. A subscription was got up, and an able native barrister was employed to plead the case before the High Court. The learned judges of this court were of opinion that there had been a misdirection, the Sessions judge having pressed upon the acceptance of the jury a theory of motive unsupported by evidence and purely speculative. They accordingly set aside the conviction and sentence; but, having regard to the direct testimony of the child Golak Mani, they ordered a new trial. Upon this trial Muluk Chand was acquitted. He then told what had actually occurred; and Golak Mani narrated how she had been frightened by the police into telling a tutored story.

To this 'romance' of criminal administration in Bengal an Introduction is prefixed by Dr. Hunter, M.P., who observes upon the superiority of Indian to English criminal procedure in allowing a direct appeal to a higher judicial tribunal. 'Had the case occurred in England,' says Dr. Hunter,

'the only appeal would have been to the Home Secretary, and he would have been compelled to arrive at truth without the aids that a public trial affords.' We believe that the system of appeal in force in India is admirably suited to the requirements of the country and to promote the true interests of justice; and we incline to the opinion that a right of appeal in criminal cases might well be allowed in England under certain restrictions. But it must not be forgotten that the Appellate High Court in India does not hold a public trial in the sense of examining the witnesses in public; it proceeds merely upon the dead record, and the arguments are confined to the evidence therein recorded. It should also be understood that it is only in cases tried by Sessions judges that an appeal is allowed. There is no appeal when a case is tried by a judge of the High Court (who exercises the same powers as one of Her Majesty's judges in England) sitting with a jury in one of the Presidency towns.

Dr. Hunter, referring to the fact of the native hospital assistant and his European superior being present and being examined and cross-examined on the second trial, remarks that it is a singular thing that the attendance of those medical men was not compulsory, and he quotes a section of the Indian Code, which allows the deposition of a medical witness, taken by a magistrate in the presence of the accused, to be given in evidence, although the deponent is not called as a witness. Dr. Hunter has misunderstood the law. The attendance of a medical witness is just as compulsory as the attendance of any other witness when he has been duly summoned. The provision quoted is intended to meet exceptional cases. Usually the medical witness in India is a member of the Army Medical Service. Upon the outbreak of war, or upon the exigencies of the public service, he may be ordered away at a few days' or even hours' notice. He may be transferred to a distance of one hundred or one thousand or more miles from the place where he gave his deposition in the preliminary inquiry before the magistrate. He may have gone on leave to England—leave necessary to recruit his health. If his deposition could not be used at the Sessions trial under any of these circumstances, there might be a grave failure of justice. For this reason, and having regard to the fact that he is a witness unconnected with the parties or the facts of the case, and therefore presumably impartial, the law allows his deposition to be read. There is by way of safeguard a further provision in the Indian Code, which allows a witness in a criminal case to be examined by commission upon written interrogatories; and the interests of justice can thus be fully served without bringing an officer of Government hundreds of miles to the great detriment of other duties equally important.

Then Dr. Hunter unfavourably criticises a section of the Indian Evidence Act under which the Sessions judge at the first trial admitted, in order to corroborate the girl Golak Mani, the evidence of certain women who stated that on the morning after the occurrence she had told them the same story as she told in court. The Sessions judge certainly did quote this section of the Act for the admission of this evidence, but his view was not supported by the High Court. So far as the report of the case shows, the point was not raised before that tribunal, and the learned judges make no reference to it in their judgment. Dr. Hunter seems to think that under the provisions of the Indian Evidence Act evidence is admissible to corroborate a witness who has not been discredited, and it is against such use of the provision that his criticism is directed. Such, however, is not the wide construction which has been put upon the section by the highest authorities in India. In this particular case it is probable that the Sessions judge rightly admitted

the evidence commented upon. There was a suggestion throughout that the child Golak Mani had been tutored by the police. Could anything be more material than to show that she had made the statement incriminating Muluk Chand before the police appeared on the scene? Then two at least of those so-called corroborative witnesses deposed to her having made this statement immediately after the occurrence and *in the presence of* Muluk Chand.

Dr. Hunter's most important observations are directed against 'the corruption of the police and their determination to support a wrong opinion by tutoring a child in falsehoods to swear away its father's life.' In these observations we fully concur, but at the same time we cannot but regret that a more striking instance of police corruption was not selected for the enlightenment of the British public. Muluk Chand's case has many palliatives, if tampering with truth can be palliated. The child Nekjan met her death at her father's hands. This was a fact; and though Golak Mani was asleep at the time and did not see the circumstances which deprived the mournful accident of all criminality, this fact in all human probability became known to the child-witness at the dawning of the day amid her father's distress of mind and his anxious consultation with the brother-in-law. This fact must strongly have impressed itself on her mind, and an astute police officer could easily have extracted it from her. Then came the positive opinion of the native hospital assistant that it was a case of murder and the cause of death was the injury in the abdomen. That her father had killed Nekjan would be the prominent idea in Golak Mani's mind. How, she did not see, did not know; and Muluk Chand, after the conference with his brother-in-law, doubtless was silent about this. How easy was it to operate upon the child's mind in this state, and supply the further idea of the manner in which the death was caused. The zealous police officer might believe this further idea imported into the child's mind to be a true idea—had not the hospital assistant vouched its truth?—and in his zeal did evil that good might come of it. Here then was false testimony manufactured, and of the most dangerous kind, as containing a large admixture of truth. Muluk Chand withheld the explanation which would have deprived the fact of all criminality. There was nothing to throw doubt on the theory of the police, and they followed the usual procedure of Indian police—they moulded the evidence to their theory. There was no bribery, no money to be gained, no enmity to be satisfied, no revenge to be obtained. The case shows the terrible danger, the awful responsibility of tampering with truth, but it is not a glaring case of police corruption. Indian experience can furnish many much worse instances. We will give one.

Some few years ago an expedition was sent against some border tribes dwelling in the hills, whom it was necessary to punish for raids on British territory. In order to the success of this expedition a large number of men to carry the baggage was absolutely necessary. The inhabitants of the district bordering on the hills, and which formed the base of operations, could not be induced by any wages offered to engage themselves for this service. The success of the expedition was in danger, and the local executive authorities thereupon sent out the police to collect coolies or baggage carriers. In other words, the men were forced to go on this service. From one village in the district most of the adult males were taken away, and a short time after a fresh detachment of police appeared to take the rest. It was strongly objected that the women would be left without protection, and the crops and cattle could not be tended, if the village were denuded of all

the grown-up males. The police, however, were inexorable, whereupon the people resisted, repelling force by force, and the police had to retire discomfited. They soon, however, returned reinforced, and the men who had acted in their own self-defence were prosecuted for resisting the police in the performance of their duty, and sentenced to various heavy terms of imprisonment. It is to be observed that forced labour was abolished by law in India many years ago, and not long since the Secretary of State vetoed an Act of the Indian legislature, because it contained a section empowering the local authorities to compel the peasantry to labour at the repair of certain public embankments, when there was danger of inundation and consequent injury to life and property. The conviction of the villagers for resisting the police was brought before a Court of Appeal, their *zemindar* or local landholder exerting himself to obtain legal assistance. The appellate tribunal held that the police were not acting in the performance of their duty, but were trespassers breaking the law in trying to seize and compel men to work as baggage-carriers against their will, that the villagers were therefore justified in resisting, and not having exceeded the right of private defence had committed no crime. They were accordingly acquitted. To the police, however, it seemed intolerable that their authority should receive such a check, and that they should be so humbled in the eyes of the people of the district. About a year after, the *zemindar* who had exerted himself on behalf of his dependents was charged with coining. After an elaborate trial of some days he was acquitted, it appearing beyond all doubt that the charge was a false one, concocted for the purpose of revenge upon him for the part he had taken in the interest of his tenants. The police had surrounded his house about two o'clock in the morning, and under pretence of searching introduced the coining implements, which were produced at the trial as the strongest evidence against him. This was a bad instance of police corruption. Those also are bad instances in which bribes have been taken in order to let the guilty escape and fasten crime upon the innocent. The Annual Administration Reports furnish other instances every year of cases wholly false or evidence tampered with to the danger of the innocent.

Dr. Hunter remarks that 'the manner in which the High Court in Calcutta discharges its duties has caused it to be regarded with veneration by the people of India as the noblest manifestation of British justice.' It is not very long since the European Head of the Police in Bengal took upon himself to comment upon the action of this tribunal and of the inferior criminal courts in dealing with cases sent up by the police, attributing failures of justice and escape of guilty persons to a too technical application of the law and a too strict adherence to rules of evidence. The Bengal Government unfortunately endorsed these observations, thus bringing about one of those unseemly collisions between the executive and judicial departments of Government which have been of too frequent occurrence in India. Ever since the first establishment of the Supreme Court in Bengal a powerful executive Bureaucracy has manifested an impatient jealousy of independent judicial authority, and has lent itself on too many occasions to disparage the prestige and dignity of Her Majesty's judges in India. On this occasion the tact and good sense of the present Viceroy restored harmony and vindicated the administration of justice. But the origin of the controversy raises a question which is deserving of some consideration. We believe that in a large number of heinous cases, with which more especially the action of the police is concerned, the guilty persons are apprehended and sent up for trial, but are acquitted and escape. The cause of this is not

however to be found in any general technicality in administering the law or in an over-strict adherence to rules of evidence. The rules of evidence in India which regulate admissibility are wider than in England, and local judges err more in admitting what should be rejected than in rejecting what ought to be admitted. The true cause is to be found in the want of skilled preparation of cases for trial. The police have little detective ability, and they do not understand what evidence is legally necessary or admissible. Their mode of procedure is to adopt a theory, not unfrequently a very astute one, and then mould the evidence to support this theory, too often manufacturing a necessary link when it cannot otherwise be supplied. When anything transpires in the course of the trial to raise a suspicion that the evidence has been tampered with, the whole case including the sound portions of the evidence is not uncommonly sacrificed in the minds of judge and jury to this suspicion. Frequently also essential facts, which could have been properly proved by legal evidence if the case had been prepared under skilled supervision, are not proved at all, or are sought to be proved by inadmissible evidence, the result being the escape of criminals who would have been convicted under a sounder system of preparation. Manifestly these failures of justice are due to the action, not of the Courts who can proceed only upon the evidence brought before them, but of those who are charged with the duty of collecting the materials which constitute evidence. This duty is cast mainly upon the police without legal advice or assistance, and beyond question the police are not strong enough for its performance. There is in each district a functionary called the Government Pleader, who undertakes the conduct of Crown cases in the Court of Session. He is not, however, consulted in the preparation of these cases. He receives his brief just before the trial commences, and he has to make the best of the materials sent him by the police and a committing magistrate, too often inexperienced and too often overwhelmed with executive work, upon the doing of which his advancement and promotion mainly depend. The Government of Bengal has had its attention drawn to this unsatisfactory state of things and to the necessity for some reform through which the collection of evidence in serious cases and their preparation for trial may be conducted under proper advice and supervision in the districts. In the Presidency towns, it may be observed, a proper system exists, and the different results of cases there tried furnish one of the strongest arguments for reform in the districts. The Government receives a large surplus revenue from the Courts; and some small portion of this surplus ought to be applied to effect a very necessary improvement in the administration of justice by providing legal assistance and proper supervision in the preparation of Crown cases for trial. If this reform were efficiently carried out, failures of justice would become rare; the police would become more efficient and less corrupt; and cases like that of Muluk Chand would cease to disfigure the annals of the administration of criminal justice in Bengal.

C. D. F.

The Forest of Essex: its History, Laws, and Administration and Ancient Customs, and the Wild Deer which lived in it. By WILLIAM RICHARD FISHER. London: Butterworths. 1887. La. 8vo. viii and 448 pp.

MR. FISHER was one of the Counsel for the Corporation of London in the great suit of *Commissioners of Sewers v. Glassey* (L. R. 19 Eq. 134), in which the Commissioners, as owners of some 200 acres of land, part cemetery, part farm, at Wanstead, successfully attacked the inclosures effected by

sixteen lords of manors within the Forest of Epping, and acquiesced in by the Crown, to whom the forest rights belonged. To this suit the book before us owes its origin, and it was desirable that the mass of ancient records collected by the advisers of the Corporation should find some more attractive repository than an old brief. Mr. Fisher's pages bear constant traces of this professional origin. It is natural for the advocate of the Corporation to ascribe the preservation of Epping Forest to 'the exertions and the sole cost of the Corporation,' even though a little before we read that the expense to the Corporation was defrayed out of the grain duty levied on all grain imported into London, and appropriated by Act of Parliament to the exclusive purpose of preservation of open spaces. And documents not capable of being put in evidence in the great suit appear not to have attracted much of Mr. Fisher's attention. He is aware of the existence of the Domesday of St. Paul's, as we gather from one reference, but he gives no other sign that it contains a full and interesting account of the condition of the manors in and near the forest held by St. Paul's in the early part of the thirteenth century. He hardly does justice to the curious change of public opinion in the last century, since the Essex reporter of the Board of Agriculture wrote, 'The forests of Epping and Hainault are viewed as an intolerable nuisance,' to the day when the 'intolerable nuisance' of the forest of Epping has been preserved to the people for ever by statute. He omits to notice that the 'assarts,' or breaking up of forest land for tillage, though offences in the royal forests, are perfectly recognised in other early manors, where the revenues derived from them form an important part of the *Extenta Manerii*. Curiously enough, in the chapter on Pannage he does not deal otherwise than by an indirect reference with the discussion of that obscure subject contained in the case of *Chilton v. Corporation of London* (L. R. 7 Ch. D. 562, 735), in which indeed he was counsel. And perhaps he is a little too lenient on the miserably narrow view of the position and duties of the Crown shown by the Government department responsible for the Crown rights in the Forest, which was all but successful in sacrificing the magnificent open space of to-day to the most petty economy and money-getting.

With these reservations, the author has compiled a very interesting and valuable work. It is hardly so picturesque as the subject would justify. A certain Roger *Deus salvet dominas* lights up a dreary number of names with his quaint appellation, and the chapter on the Forest deer, with the great destruction that fell on them in 1489 when they were 'devoured with swyn and slayn with curres and smeten with arrowes and dede of murreyn' to the number of over 300, is interesting; but one feels that the author might have made a more readable book if his attention had not first been drawn to the matter by his brief. Still to the student of our early institutions these pages will furnish abundant interest. If to old courts the Reeve and four men from each township came, in the forest we find the Reeve and 'his assistants the Fourmen' flourishing in the last century. If in the manor of Domesday we find *bordarii* and *cotarii*, we have in the Forest the 'cottagers' continually appearing, and in the seventeenth century we read of the 'borderers.' If we learn in Mr. Seebohm's pages of the three great open fields of the township, we have to this day the common meads at Waltham in several strips part of the year, some of freehold, some of copyhold tenure, and common to all ratepayers, or to all landowners in the field for the rest of the year. In short, this book provides abundant materials for making the dry bones of past records live, even if its own pages might with advantage have been more enlivening.

T. E. S.

The Law and Practice of Petition of Right under the Petitions of Right Act, 1860. By WALTER CLODE. London: William Clowes & Sons. 1887. 8vo. xi and 264 pp.

THE author in his preface craves a lenient judgment on his work as being the first to deal with this branch of the law; but an examination of it, we think, proves that it stands in need of no special indulgence.

The first three chapters are devoted to the nature and origin of petitions of right; the next nine discuss the various cases in which this remedy is available; while the remainder of the work deals with practice. The Petitions of Right Act of 1860 supplied a new system of procedure so much more convenient than the old that the latter, though in no way repealed, has been in fact superseded by the new. Hence the portion of the work devoted to practice consists chiefly of a commentary on the statute itself. But inasmuch as the Act, while thus providing an alternative procedure, in no respect modified the substantive law, the limits of the remedy must still be sought in precedents ancient and modern, and it is consequently important for the determination of the various questions which may arise to be acquainted with the ancient origin of these petitions.

I. *Nature and Origin of Petitions of Right.*—In the first chapter the author discusses, without attempting to solve, the question of the origin of the petition of right, and presents in a clear tabulated form the evidence in favour of the two rival theories, (i) that by an express enactment of Ed. I it was substituted for an ancient right of action against the Crown; and (ii) that by reason of there never having been a right of action against the Crown, redress of whatever character was of necessity sought by petition. The second chapter traces the history of petitions of right back to the early days when the King in Council performed the functions alike of legislator, executive, and judge; and by numerous citations from the various petitions which have been published in the *Rotuli Parliamentorum* illustrates the classification of petitions which gradually took place as the various departments of state with their special functions were in process of time evolved from the Council. The petitions which remained after the High Court of Parliament, the Exchequer, the various tribunals for the administration of law and equity, and the Privy Council in its several chambers had absorbed those which fell within their respective jurisdictions were denominated Bills of Grace. These remained unchanged; they were still 'baillies au Roy mesmes'; answered by the King himself in the same terms, and made the subject still of commissions issued to investigate the suppliant's title before being handed over for trial to a court of law,—a genuine relic of the old practice of petition to the King and his Council, deriving its name, as the author with much probability contends, from the ordinary form of royal response endorsed on the petition, 'soit Droit fait als parties.' There is no more interesting problem in the history of our law than this of the gradual differentiation of that great organ of government known as the King in Council—an interest that is none the less that the investigation is not without a practical bearing on modern theories, although unfortunately many of the details are veiled from us by the mists of ages. Where so much is uncertain it is difficult to arrive at indisputable conclusions on matters of detail; but Mr. Clode has set forth with admirable clearness so much of the old state of things as is necessary for the discussion of practical questions which may depend on the ancient theory and doctrine of this form of remedy.

II. *Where a Petition will lie.*—The author next treats in successive

chapters of the persons to and by whom petitions of right may be sued, and the courts which have jurisdiction to entertain them. Several more are then devoted to a discussion of the various cases in which such petitions will and will not lie, both at common law and in equity. The authorities appear to have been very thoroughly searched from the Year Books down to recent cases reported in the Weekly Notes and the Times newspaper; while the early instances of petitions contained in the Rotuli Parliamentorum and other sources which were not treated as of authority by such fathers of the law as Broke and Fitzherbert and the compilers of the Year Books have been wisely omitted.

The author discusses clearly and with judgment the numerous moot points which the subject presents: such are the questions whether a petition abates by the death of the Sovereign, whether subjects can sue jointly, whether the right of suit is assignable, and whether a petition can be sued where the remedy of Monstrans is available. At p. 52 he adopts with approval, as stating the true doctrine, the opinion expressed by the Court in *Feather v. The Queen*, 6 B. & S. 294, namely, 'that a petition of right, unlike a petition addressed to the grace and favour of the Sovereign, is founded on a violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained.' Yet at p. 63 he says, 'It cannot be too constantly borne in mind that the rights which the subject has against the Crown are entirely different to, and independent of, those which he has against his fellow-subjects; and further, that the test by which it can be decided whether any particular claim of a subject's against the Crown can be maintained is not its legal sufficiency considered as a claim against a subject, but the foundation in precedent which it has considered as a claim against the Crown.' Putting aside cases of the Crown's immunity based (as in the case of torts) on special rules of law, it is difficult to reconcile these two points of view, and if the principle laid down by the author is correct, as in strict theory it probably is, the proposition stated in *Feather v. The Queen*, which is not of a merely negative character, must be regarded as a generalisation expressing not exactly what the law then was, but at any rate what it was desirable that it should be, and what in fact it has continually tended to become.

At p. 164 the author cites and discusses the case of *Irwin v. Grey* (3 F. & F. 635), where a suppliant, to whose petition a fiat had been refused by the Crown on the advice of the Home Secretary, unsuccessfully sued the minister for not 'submitting' the petition to the Crown within the true meaning of the Act. And on the next page the author submits 'that the granting of the "fiat" is a purely voluntary act, and that the Crown cannot be compelled to grant it.' It would, however, have been interesting to have had the author's views on the limits, legal or constitutional, which hedge a minister in submitting or advising upon a petition of right—whether, for instance, he may decline to submit a petition which is 'frivolous and vexatious,' and whether, on the other hand, he can be rendered responsible legally or constitutionally if he refuses to submit or gives erroneous advice upon a petition which is well founded.

In no part of his book does the author better exhibit his thorough comprehension of his subject than in the chapter relating to claims for breaches of contract. His contention is that the decision in *Thomas v. The Queen* (L. R. 10 Q. B. 31), which laid down upon the authority of the Banker's Case (14 State Trials, 1) that a petition of right will lie for a breach of contract resulting in unliquidated damages, was erroneous through misap-

prehension chiefly of Lord Somers' judgment in that case. It is impossible to give here the author's most interesting and able argument, which is necessarily elaborate in proportion to that which it seeks to displace. It is difficult to suppose that a principle which has since been so extensively acted on alike in England and in other parts of the Empire, and which provides a remedy in precisely that class of cases which, as the author points out, appears to have led to the revival of these petitions after 250 years of almost total disuse, will ever be successfully questioned; but the author is none the less successful in convincing us that his criticism is entirely justified by the authorities existing at the time of the decision. Nothing indeed is more striking than the looseness of ideas which appears to have been entertained in regard to many parts of the subject. This is well exposed by the author in his chapter on petitions of right in Equity, in which he shows that prior to the Statute of 1860 there was no authority for a genuine petition of right being sued in Equity. He does not, however, consider the effect of the Judicature Act of 1873 in this connection; yet it is difficult to avoid the conclusion that, however the matter may have stood prior to 1875, the combined effect of secs. 16 and 34 of the Act of 1873, and of sec. 7 of the Petitions of Right Act has been to confer on the Chancery Division a valid title to the jurisdiction it has been in the habit of exercising in this respect.

III. *Procedure*.—The part devoted to practice has been executed with the same skill and completeness as the rest of the work. It consists of a full commentary on the statute in which all the cases are discussed which throw light on matters of procedure. This is followed by the statutory schedule of forms and two appendices containing (i) the Return of all petitions of right presented and filed by Her Majesty under the statute down to 1876, showing in each case the suppliant's name, the subject-matter of the petition and the result of the proceedings; and (ii) the laws regulating proceedings by petitions of right in Ireland, Scotland and certain colonies and dependencies.

We have observed a few errors in printing, comprising one or two mistakes in references, which should be corrected in a subsequent edition. But the book as a whole is an excellent piece of work, and is an example of the way in which one of the most intractable parts of our law can acquire a greatly increased interest by being reduced to clearness and order.

The Principles of Equity: a Treatise on the system of Justice administered in Courts of Chancery. By GEORGE TUCKER BISPHAM. Fourth Edition. Philadelphia, Pa.: Kay & Brother. 1887. 8vo. lxxxvi and 659 pp.

It is a sufficient testimony to the excellence of Professor Bispham's work that his treatise on the Principles of Equity has in thirteen years reached a fourth edition. That a book of this scope and magnitude should attain so wide a popularity speaks well alike for the perspicuity of the writer and the intelligence of the reader. Where the bulk of the work is so good, it may seem ungracious to criticise. But there are some details which would bear amendment, such for instance as the amorphous heading in the index, 'Waltham, John De, erroneously supposed to have invented the subpoena,' and the description of the plaintiff in *Tyrrell v. The Bank of London* (10 H. L. Cas. 28), who was in fact a solicitor, as 'a member of the bar, whose

firm, it had been agreed, were to be employed as the solicitors of the company.' The individual so described would rank as the first of English 'bar-solisters.' We may add, specially referring to pp. 612, 613, that the errors of pen or press are of more frequent occurrence than they ought, in a fourth edition, to be; that the book before us is, as is usual with American law-books, numbered in paragraphs,—a system more convenient to the writer than to the reader; and that, though all the references in the index are to the paragraphs, no indication of such being the case is to be found where it ought to be, at the head of each page of index.

Our present purpose is to notice some of the characteristic features of Equity which are in the United States, but are not in Lincoln's Inn. The limits of the subject are ill-defined. As Lord Hardwicke said in 1745: 'The Court very wisely hath never laid down any general rule beyond which it will not go, lest other means of avoiding the equity of the Court should be found out.' Nor have the rules of Equity existed, like those of the common law, from time immemorial. In many cases we know, as the late Sir George Jessel said in a famous case, the names of the Chancellors who invented the rules of the Chancery Courts. We can give the date when they were first introduced into Equity Jurisprudence. 'The doctrines are progressive, refined, and improved; and if we want to know what the rules of equity are, we must look, of course, rather to the more modern than the more ancient cases.' This being so, it is instructive as well as interesting to watch the independent growth of transatlantic Equity. In some States an English tenet is accepted, in others it is rejected. Speaking generally, Professor Bispham states 'that the principles of justice, as administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction, have been adopted in nearly all, it would not be too much to say *all*, of the United States.' It is naturally in smaller matters that we find divergence. The Pennsylvanian Courts refuse to recognise the severance of legal and equitable titles in cases where in England the trust would not be executed, e.g. where there is a mere trust to convey. They treat the legal fee as having passed to the beneficial owner. Again it would seem that in some of the States the position of those men who in England are continually becoming trustees is an enviable one. In New York, Michigan, Louisiana, and Wisconsin, we read, trusts have been abolished except within very narrow limits. All these States, except Louisiana, are chary too in having anything to say to resulting trusts. Once more. In South Carolina, Pennsylvania, and other States the Courts have differed from the English rule, and have decided that a *feme covert* has no power over her separate estate, except that which has been given her by the instrument creating the trust. On the other hand, in nearly all the States, as in England, the doctrine of an equity to a settlement is fast becoming obsolete under the otherwise questionable influence of Married Women's Property Acts. We note in passing a noteworthy decision that a trust 'to secure the passage of laws granting women a right to vote and hold office' is not a charity, and an application *cypres* of a trust in the same case (*Jackson v. Phillips*, 14 Allen 571) which, coming into effect after the abolition of slavery, sought to provide for the 'preparation and circulation of books and newspapers, the delivery of speeches, lectures, and such other means as in the trustees' judgment will create a public sentiment that will put an end to slavery in this country, and for the benefit of fugitive slaves escaping from the slave-holding States.' Another difference between the law which prevails on either side of the Atlantic is, that in Great Britain, as is well known, the trustee may lose in the management of the trust, but cannot gain, while in

the United States trustees and other fiduciaries are entitled to a reasonable compensation for their services, the amount being in some States fixed by statute, and in others regulated by the Court to which the trustees are liable to account. Turning for a moment to the law of mortgages, in the United States the mortgagor's interest is regarded as being one of a legal, not, as with us, of an equitable character. And to them the doctrine of 'tacking' is happily unknown. So, too, is the rule upon which large encroachments have been made of late years, which laid it down that a voluntary transfer of such property as could not be reached by execution was not fraudulent against creditors. There is a difference too in the construction here and there of the rule which is labelled as that of the Statute 27 Elizabeth, cap. 4. Here it is held that a voluntary conveyance is void as against a subsequent purchaser, even though he may have notice of the same, the theory being that, as the voluntary conveyance is rendered void by the statute, no subsequent purchaser is bound to regard it. There, however, but not uniformly in all the States, a purchaser who has notice of a prior voluntary grant will take subject to the rights of the voluntary grantee. Howbeit the doctrine of notice has never been regarded with favour in the United States. And the Courts of that country have very much, if not altogether, avoided the necessity for marshalling the assets of a deceased by laying down from the first a general rule that 'estates of all kinds, both real and personal, are considered assets for the payment of debts, and that specialty and simple contract creditors stand, as respects both classes of property, upon the same footing.' But marshalling is freely resorted to for the adjustment of the liabilities of living debtors. Concerning the vendor's lien for unpaid purchase money, which was crystallised in England by *Mackreth v. Symmons*, there is a remarkable diversity in the Union. In some States and in the Federal Courts the doctrine has been adopted; in others it has been repudiated; while in a third class, the rule has been abrogated or modified by Statute. Our common mortgages by deposit of title deeds have been sustained, though infrequently, in some States, but they have been disapproved in Kentucky and rejected in Pennsylvania and Ohio. In the law of partnership, again, we find the doctrine of conversion differently applied in England and in the United States. Here the rule is, that where land is bought with partnership funds for partnership purposes, and is in the proper sense of the term an asset of the partnership, it is converted into personalty 'out and out,' not only for the purpose of answering the liabilities of the partnership, but also as between the real and personal representatives of a deceased partner. But almost throughout the Union the rule is, that the conversion is limited to the purposes of the partnership, and *ultra* those purposes the property is treated as if in its original state. That is, the surplus goes to the real representatives of a deceased partner. But in Kentucky the English rule is followed, as it was at one time in Virginia. In the matter of administration we learn from Prof. Bispham that administration actions are of much less importance, and of much less frequent occurrence in his country than in England, as the distribution of such assets is, in most States, vested by Statute in Probate or Orphans' Courts, or similar tribunals. Happy the country, Charles Dickens would have said, which knows no administration action! However, with us they are under the beneficial operation of Order LV of rare occurrence compared with the day which was chronicled or caricatured in *Jarndyce v. Jarndyce*. Lastly, to conclude this *résumé* of some of the salient variations of American from English law as set out by Prof. Bispham, we find a singularity rather of name than of reality in the 'bill to remove a cloud from a title,' which

belongs to the same family as our former bills *quia timet* and bills of peace, the doctrine being capable of assertion 'in almost any case in which justice requires that the title of a party in possession should be quieted, and the evidence of that title is clear.'

The Law of General Average English and Foreign. By RICHARD LOWNDES. Fourth Edition. London: Stevens & Sons. 1888. 8vo. xliii and 696 pp.

IN this edition the text has been increased by about 100 pages, and the body of appendices by about the same number; some fifty fresh cases have been included, of which a few are taken from American reports; but the greater part consist of English decisions given since the last edition in 1878.

Its publication, the author tells us, has been considerably delayed by reason of the long litigation of the cases of *Atwood v. Sellar* (4 Q. B. D. 342 and 5 *ibid.* 286) and *Svendsen v. Wallace* (11 Q. B. D. 616, 13 *ibid.* 69, and 10 App. Ca. 404), which for a time had the effect of bringing complete uncertainty over the proper treatment of a question of every-day practice, namely, that of the expenses consequent on putting into a port to repair damages, and at the same time raised doubts as to the true meaning and application of Lawrence J.'s definition (in *Birkley v. Pretgrave*, 1 East 220) of general average, hitherto the very keystone of our law on the subject. The author regrets that these cases were not decided in accordance with the views of the dissentient minority of the judges, and especially with the opinion consistently maintained in them by Baggallay L.J. If the very motive of the rule of general average is to encourage the taking of measures tending to the rescue alike of ships, cargoes and lives, surely no encouragement really deserves the name which does not pay the expense in full, including that of putting to sea again! This ground of policy is certainly weighty, and we find accordingly that most of the foreign codes have adopted the broader rule.

The judgment of Lord Esher (Brett M.R.) in *Svendsen v. Wallace* as an argument in deductive logic is indeed unanswerable, but the author points out that just as the learned judge held the expenses of discharging the cargo, when necessary to enable the ship to be repaired, to be general average, because they formed a part of the 'going into port to repair,' i. e. of bringing the vessel effectually into a position to be repaired, so it might equally have been held that the charges for reloading, and the pilotage and port-dues on quitting the port, similarly constituted a necessary part of the expense of putting into port to repair, within the true meaning of the rule. In other words, the decision of the Court involved in any case some constructive extension of the natural meaning of the phrase 'going into port to repair,' and both principle and policy would have justified the somewhat wider extension which Baggallay L.J. was in favour of. This is still more apparent if for the above expression he substituted 'putting into port for safety.'

In the last edition the author noted as one of the questions that stood in need of judicial decision the propriety of disallowing as general average the damage caused by voluntary stranding, except when effected in order to extinguish a fire on board. The matter still remains, however, in an unsettled state, and one of the most interesting sections in the book is devoted to a discussion of the subject, and contains an ample collection of the various materials for forming a judgment on the question.

The movement which was commenced some years ago in favour of a uniform system of general average adjustment throughout the maritime world does not appear to have borne all the fruit that was hoped or expected of it. A very considerable degree of uniformity has, however, been attained, as may be seen by referring to the comparative Table of the Laws of General Average prefixed to this work, or to the various extracts from foreign laws and codes set out in the appendices, which have been recast so as to keep pace with the progress of foreign legislation during the last ten years.

General average forms so small a branch of the law, and is moreover so much in the hands of average adjusters, that it cannot be said to be of very wide legal interest. It affords, however, a singular example of the felicitous power of definition of the Roman law, for after studying all the definitions attempted by English lawyers we can agree with the author in doubting whether any one of them 'equals in accuracy and concise fulness the original maxim of the Rhodian law, which in so few words gives the rule, the reason for it, and a typical example;' *si levandae navis gratia jactus mercium factus est, omnium contributione sarcitur quod pro omnibus datum est.*

It may be confidently asserted that whether for the purposes of the adjuster or the lawyer, Mr. Lowndes' work presents (in a style which is a model of clear and graceful English) the most complete store of materials relating to the subject in every particular as well as an excellent exposition of its principles.

A Treatise on the Law of Bailments, including Carriers, Inn-keepers, and Pledge. By JAMES SCHOULER. Second Edition. Boston, Mass.: Little, Brown & Co. 1887. La. 8vo. lviii and 795 pp.

THE first edition of this book did not find a place in our principal law libraries, although we gather from the preface that it was destined to take the place of any further edition of Mr. Justice Story's work. This was perhaps due to the fact that the greater part of its field had been covered by recent books both on negligence and on carriers. The publishers desired, in issuing a new text-book on Bailments, to give particular prominence to the modern law of carriers, which occupied less than one-third of Story's treatise; and accordingly of the present volume more than one-half is devoted to that subject.

To an Englishman's way of thinking the mode of treatment is somewhat too discursive, and so takes a middle course between the two best methods which a text-book can pursue; for while dealing preeminently with principles, it does not attain the conciseness and precision of a digest; and, on the other hand, it does not come to really close quarters with the intricacies of case law.

Though the space allotted to the different parts of the subject varies, as before stated, from that adopted in Story's work, the general arrangement is not otherwise very different. Such differences as there are seem to us to mark a distinct improvement; thus the author has, we think wisely, discarded the Roman terms *depositum* and *mandatum*, and has expressed the divisions of his subject in clear and well-chosen English terms, classing together in Part II all Bailments for the Bailor's sole benefit, in Part III all those for the Bailee's sole benefit.

It is not easy to arrive at an adequate and at the same time simple definition of Bailment. The author adopts the following: 'A delivery of some chattel by one party to another to be held according to the special purpose of the delivery, and to be returned or delivered over when that

special purpose is accomplished ;' but admits that it is not wide enough to embrace all so-called bailments. Perhaps it would be best to confine the term, according to its etymology, to cases where there is a real delivery. It is a violent fiction to call a finder a bailee at all. But if a quite general definition be desired, one might suggest 'the possession by one person of the chattel or goods of another on the terms of mutual obligations imposed by contract or implied by law.'

The author does not lack enthusiasm for his subject. Who shall be heard to talk of the dry bones of the law, when the subject of Common Carriers can raise such a glow of poetic fire as the following? 'This branch of bailment law owes most of its inspiration to the creative genius of modern times ; so that, unlike the fabled genie which rose cloud-like from the vase of its mysterious confinement, when a fearless hand broke the seal of Solomon, this once-stifled giant of the codes, likewise made free to overspread sea and shore, goes on enlarging in bulk and stature, destined, perhaps, to lose all shapeliness of feature in so immense a mass, yet certain never to re-enter its ancient prison.'

The Law of Railway Companies: being a collection of the Acts and Orders relating to Railway Companies in England and Wales, with Notes of all the Cases decided thereon, and Appendix of Bye-laws and Standing Orders of the House of Commons. Second Edition. By J. H. BALFOUR BROWNE, Q.C., and H. S. THEOBALD. London: Stevens & Sons. 1888. La. 8vo. lv and 916 pp.

THIS book is one which from its form is necessarily characterised by marked merits and by equally marked drawbacks. All the Acts relating to or affecting railways are placed in chronological order, and the judge-made law which has grown up around them is added in the form of notes to particular sections. Economy of space is thus at once gained, as well as great facility of reference, and so the book is one which cannot fail to please the thorough man of business, especially if he is to some extent acquainted with railway law before he finds it necessary to consult this work. But a student who for the first time opened its pages would find before him a legal chaos ; because, for one thing, it is wholly impossible to place each of the various points of railway law under a section with which they are logically and closely connected. For example, under s. 89 of the Railway Clauses Act, 1845, which is to the effect that a company is not to be liable to a greater extent than common carriers, are grouped some seventeen pages of notes of cases dealing with all sorts of subjects, such as damages for personal injuries, for breach of contract, contributory negligence, and so forth. This kind of artificial grouping is however clearly inseparable from the character of the book, for, not being a treatise, there can be no systematic arrangement of the materials under carefully thought-out heads. But while this treatment has its drawbacks, it has considerable merits where the subjects fall naturally under some Act, as in the case of rating decisions which can reasonably be grouped under the Union Assessment Committee Act, 1864, which forms a kind of heading for the collection of cases. The treatment of the decisions by the authors is clear and concise—perhaps it may be almost regarded as crude, because there is scarcely sufficient distinction made between important and comparatively trivial cases. Thus the famous decision in *The Bernina*, 12 P. D. 56, which overruled *Armstrong v. The Lancashire & Yorkshire Ry. Co.*, L. R. 10 Ex. 47 and a long course of judicial practice, is disposed of in three lines and a half, though it is based

on clearly-defined principles and has far-reaching consequences. Again, economy of space has sometimes been gained at the expense of clearness of reference. Thus we are told that any interference with an easement appurtenant to land entitles the owner to compensation, and that this has been decided with reference to a private right of way and to an easement of light. Five decisions follow to support the proposition and the examples, but the practitioner is not told which refer to the right of way and which to the easement of light; and so it may be that his time will be wasted in looking through several decisions. But marked as these defects are, they are outweighed by the business merits of the book, which is a valuable one for many practitioners, and many persons engaged about the business of English railways.

The Law of Principal and Agent in Contract and Tort. By WILLIAM EVANS. Second Edition. London: William Maxwell & Son. 1888. 8vo. xxviii and 658 pp.

THE changes effected in this edition call for little comment, the general plan of the work having been retained unaltered. Some eight new sections have been added, and a large number of additional cases, over 500, have been incorporated into the text and notes, with the effect of increasing the former by some sixty-seven pages. New decisions have been carefully discussed where necessary, according to the method adopted in the first edition, and the utility of the book has been greatly increased by being brought down to date.

We miss a few decisions which seem to us of sufficient importance to have merited insertion in their appropriate places, viz. at p. 157, *Gordon v. James* (30 Ch. D. 249), on the authority of a solicitor to receive mortgage money; at p. 181, *Levis v. Ramsdale* (55 L. T. N. S. 179) on the restriction of a power of attorney in general terms to the special purposes for which it is granted; at pp. 231 and 237, *Barrow & Bros. v. Dyster Nalder & Co.* (13 Q. B. D. 635), and *Hutcheson & Co. v. Eaton & Son* (ibid. 861), on the question when a broker is personally liable on his contract, and what written terms will exclude evidence of custom to render him responsible; at p. 472, *Isaac Cooke & Sons v. Eshelby* (12 App. Ca. 271), on the right of a buyer to set off against the seller a claim available against the seller's agent, a case not only important but open to serious criticism.

Again, the citation of *Maspons y Hermano v. Mildred* at p. 476 should have included the decision in the House of Lords (8 App. Ca. 874), and that of *Re Cape Breton Company* at p. 302 the decision in the Court of Appeal (29 Ch. Div. 795): the report of the case in the House of Lords (12 App. Ca. 652) was no doubt too late for insertion.

We have also noticed some omissions in the table of cases,—omissions the more to be regretted because completeness in this respect enhances the value of a good book.

Wilson's Supreme Court of Judicature Acts, Rules, and Forms, &c. Sixth Edition. By CHARLES BURNEY, M. MUIR MACKENZIE, and C. ARNOLD WHITE. London: Stevens & Sons. 1887. La. 8vo. cvii and 956 pp.

IN our last issue we credited 'Wilson's Judicature Acts,' by a clerical slip, with the citation, on a rough calculation, of 1400 cases only. The number of cases really cited approaches double the estimate we then gave, and is more than half the number cited in 'The Annual Practice.'

We may add to the comments which we made on this pair of works last January that 'Wilson' is admirably adapted for use in the common law courts. We have used it for some time, and we have not found it wanting. It is true that 'Wilson' does not call in aid the mass of cases from the 'Weekly Notes' which the industrious practitioner may have 'noted up' on such an Order as LV or on Order LVIII, r. 15. A Chancery practitioner, accustomed to his 'white book,' may cavil at 'Wilson' for citing too few decisions. But in our judgment there is not always strength in the multitude of cases, and we think that 'Wilson' has nearly approached the medium of safety. It is always easier for a writer who knows of a case to cite it than to summon up the courage which is necessary to leave it out. Among other things that are admirable in 'Wilson' are the yellow edging with which the pages containing the Rules of the Supreme Court, 1883, are differentiated, and the exiguous nature of the 'Addenda and Corrigenda' list, which we are glad to have no wish to expand. We believe that this collection of Rules is an exhaustive one, and we think that this analysis of the 'judge-made' law which has quickly accumulated on the Rules is a sound and an accurate digest.

The Merchandise Marks Act, 1887, with special reference to the important sections, and the Customs, Regulations, and Orders made thereunder, together with the Conventions with Foreign States for protection of Trade Marks. By HOWARD PAYN. London: Stevens & Sons. 1888. 8vo. vii and 132 pp.

THIS is a neat and practical little work. The so-called 'General Introduction,' which would have been more fitly termed an Explanatory Chapter, occupies thirty-two pages, the Act and Notes about the same space, whilst the remainder of the book is occupied by the Appendix. We think that Mr. Pyn's work will be found a clear and useful guide. Thus he points out by way of example how the words 'superfine make' might be an indirect indication of the English origin of a bale of goods, and so cause them to be liable to detention, as being a false 'trade description.' He then shows the need to add, in the event of these or similar words being stamped on goods, a counter statement as to manufacture abroad so as to secure a free entry for the goods in question. We have taken this particular instance because questions arising under the head of false trade descriptions are the most difficult and calculated to give most trouble both to the Custom-house officers and merchants. Except this introductory statement and a few notes to the Act there is no original matter in the book. But this abstemiousness is to be commended, for commentators on Acts are too fond of padding up their books by pointing out, without need, distinctions between the Act under discussion and prior or similar statutes.

La philosophie du droit. Par DIODATA LIOY. Traduit par LOUIS DURAND et précédé d'une préface par LOUIS DURAND et JEAN TERREL. Paris: Chevalier-Maresq & C^{ie}. 1887. cxxxvi and 587 pp.

THIS book had already been translated into German. The French translator has taken advantage of the notes in the German edition, and added original ones of a comparative character. The author moreover has himself revised the translation.

Lioy's work is one of the best which have yet been written upon the subject. It is abreast of modern ideas, research and learning, though the author rather combats than espouses modern views. He is a follower of neither the

utilitarian nor the interest theory. He holds the sources of law to be of a spiritual nature. However, it is one of the merits of the book that the author does not harp much on an independent line of thought of his own. He divides his subject-matter into two parts, the first called 'Objet du droit,' the second 'Sujet du droit,' a division obviously borrowed from the Germans. In the former part, Liroy deals under separate headings with Religion, Science, Art, Industry, Trade, Morality, and Law; in the latter, with the Individual, the Family, the District (Commune), the Province, the State, the Community of States and Humanity. The term Philosophy of Law is perhaps somewhat too limited a title for so wide a subject. Be that as it may, the book is certainly interesting and instructive.

Questions de droit maritime. Par ALFRED DE COURCY. 4^{ème} série.
Paris: F. Pichon. 1888. 8vo. xxi and 481 pp.

THE able manager of the *Compagnie d'assurances générales* expects this volume to be the last of the interesting series, the publication of which he began ten years ago. His essays are upon questions of the day which have fallen within his personal experience, and have no consecutive bearing on each other. Two long chapters of the present volume deal with employers' liability. Another is devoted to exoneration of liability for negligence. One which will be read with interest by Englishmen gives the author's views upon the procedure of our Courts. His strictures on trial by jury in civil causes, and his contrast between our costly safeguards of justice and the more practical and less expensive French procedure, are worthy of the attention of English reformers.

Code de Procédure civile pour l'Empire d'Allemagne. Traduit et annoté par E. GLASSON, E. LEDERLIN and F. R. DARESTE. Paris: Imprimerie Nationale. 1887. xc and 354 pp.

THIS valuable translation by thoroughly competent men, of whom M. Glasson is well known to English jurists, forms one of the series of translations of foreign Codes in course of publication by the Foreign Legislation Commission at the Ministry of Justice in Paris. The historical and analytical introduction and the abounding comparative notes give the work a value quite apart from that which it possesses as an excellent translation. Not the smallest merit of the book is its exhaustive and careful index.

The Elements of Jurisprudence. By THOMAS ERSKINE HOLLAND. Fourth Edition. Oxford: Clarendon Press. 1888. 8vo. xx and 378 pp.

MR. HOLLAND has succeeded in keeping the additional pages of this new edition within a small number. If the book continues to enjoy the well-deserved favour it has hitherto done, the author may yet have hard work to save it from being oppressed by details, and thereby losing some of its merit and convenience as an elementary book of instruction and reference. We would suggest for consideration whether in a future edition the German phrases and extracts might not be reduced. We cannot have an adequate scientific treatment of English law without an adequate English terminology which can be understood without reference to forms of speech cast in the mould of another language. So long as we set before English students such

signs as 'Juristic Act,' so long will they mostly neglect and refuse to believe that the thing signified has any real existence in English law.

A few references to recent cases, given only by date or from newspapers, need posting up; and on p. 170 *Ex parte Gilchrist* is, by one of those vexatious little slips which recent changes in the Law Reports have multiplied, cited as being reported '17 Q. B. 521' instead of '17 Q. B. Div. 521.'

Charitable Trusts: the Jurisdiction of the Charity Commission, being the Acts conferring such Jurisdiction, 1853-1883, with Introductory Essays and Notes on the Sections. By RICHARD EDMUND MITCHESON. London: Stevens & Sons and W. Maxwell & Son. 1887. 8vo. xxxii and 415 pp.

THIS work is what on its title-page it pretends to be. It will be useful to the equity practitioner as giving him the Acts collected together, with references to the cases decided on the various sections. We notice that a case reported in June (*St. Botolph's Estates*, 35 Ch. D. 142) is not mentioned; nor is the Act of last Session, 50 & 51 Vict. c. 49. In other respects we have found this part of the work fairly complete. A very instructive part of the Introduction consists of the history of Charity Commissions in general, and of the present Charity Commission in particular. It appears that the Commissioners perpetually hunger after new powers. One of their favourite ideas is to lay a tax on charities to support their ever-increasing staff—all for the good of the charities, of course. But what would have been said of the Livery Companies if they had proposed to do anything of that kind?

Alphabetical Reference Index to recent and important Maritime Law Decisions. Compiled by ROBERT R. DOUGLAS. London: Stevens & Sons. 1888. 8vo. xvi and 240 pp.

THIS book may be of use to business men, but will be of little use to lawyers. It is described on the title-page as a Reference Index, but it refers to no law or newspaper reports or to any other authority for its versions of the decisions abstracted. As a digest of reported cases it is therefore useless; as an index to the columns of the *Times* and *Shipping Gazette* it may be of use, for the dates of the decisions are given, and apparently it is the reports of these or other newspapers that have been indexed. Occasionally a case is referred to in the Courts of which the only report is in a newspaper, but this rarely happens, and newspaper authorities are of little weight. Some of the decisions summarized by Mr. Douglas are startling: for example, p. 62, that the appearance of a steamer's mast-head light indicates that 'it is that of a steamer whose side-lights are obscured by fog.' Under the head (p. 77) of Compulsory Pilotage is a vague and inadequate summary of the law of pilotage at various ports; 'about,' p. 5, is an odd heading for an Index; and the cross-references (pp. 8, 9, 28, and *passim*) are whole pages in length and altogether excessive.

Attachment of Debts and Receivers by way of equitable execution. Second Edition. By MICHAEL CABABÉ. London: Maxwell & Son. 1888. 8vo. xii and 164 pp.

IN this edition of a work on Interpleader and Attachment Mr. Cababé has dropped 'Interpleader' and taken in 'Equitable Execution' as a cognate subject to Attachment of Debts, and we think he has done wisely. Both

subjects are as a general rule neatly and carefully dealt with. But it is not enough to say that 'the provisions of the Common Law Procedure Acts, 1854 and 1860, are almost identical with those of Order XLV of the Rules of the Supreme Court, 1883;' the reason for the considerable variations of language between the two sets of provisions (both of which are printed at length) ought surely to have been pointed out. We read with some surprise that a legacy is not attachable (*M'Dowall v. Hollister*, 3 C. L. R. 933; 25 L. T. O. S. 185), and think it should have been stated whether or not, looking to the fact that since the Judicature Acts an equitable debt is attachable (see *In re Cowan's Estate*, L. R. 14 Ch. D. 638), this would still hold good. Equitable execution is dealt with more shortly, but with more and better original writing, and there is a short collection of forms, one or two of which are original. There is the doubtful convenience of a double index, one to each part of the work, and the few 'statutes cited' are given in each index instead of being placed in a 'table of statutes' at the beginning of the book in the usual and more convenient fashion. Lastly, we must complain that only one set of reports (the Law Reports) is referred to.

A Treatise of the Law and Practice relating to Vendors and Purchasers of Real Estate. By the late J. HENRY DART. Sixth Edition. By WILLIAM BARBER, Q.C., R. B. HALDANE, and W. R. SHELDON. 2 vols. London: Stevens & Sons, 1888. La. 8vo. cccciv and 1669 pp.

MANY members of both the branches of the legal profession will be glad to hear that the new edition of this well-known and highly-appreciated work has at length been published. It has been long in preparation, and the extensive changes and numerous improvements which have been introduced are the result of assiduous labour combined with critical acumen, sound knowledge, and practical experience. The popularity of the treatise is too well established to stand in any need of commendation; but it is probable that on a future occasion we shall give some further account of the special features upon which the present edition relies for enlarging, if possible, the wide circulation of its predecessors.

We have also received:—

Le Droit de la Guerre. Par le Professeur EMILE ACOLLAS. Paris: Delagrave. 1888. 12mo. 166 pp.—This is a neat little handbook, but contains rather more of purely individual speculation than seems desirable in a work of elementary instruction. The author has a strong opinion that no State is entitled, under any circumstances, to cede any part of its territory without the consent of the inhabitants; and on the other hand, that any and every section of a State (*la commune, le canton, la province*) has an absolute natural right of secession. This may be arguable, but it is not the general opinion of publicists. Bluntschli is often referred to, seldom with assent, and sometimes with dissent only just within the bounds of literary comity.

Precedents of Deeds of Arrangement between Debtors and Creditors, with Introductory Chapters; also the Deeds of Arrangement Act, 1887. By GEORGE WOODFORD LAWRENCE. Third Edition. London: Stevens & Sons. 1888. 8vo. viii and 142 pp.—Since the last edition of this work the Deeds of Arrangement Act, 1887, has materially affected the subject of this treatise; and the author has now duly set out the Act, together with some notes and with the consequent new rules and orders. In a short time—possibly

within a few months—we may be able to know something of the practical working of the new statute and to estimate the effect which it will have on arrangements outside the Bankruptcy Law. The Act is very stringently drawn, and the author expressly disclaims any attempt to drive the proverbial coach-and-four through it.

Histoire de la vallée et du prieuré de Chamonix du X^e au XVIII^e siècle. Par ANDRÉ PERRIN. Chambéry, 1887. La. 8vo. 256 pp.—This work is complementary to the collection of documents lately published, and will make it more generally known that Chamonix was not an undiscovered wilderness down to the middle of the 18th century, but on the contrary was a place with a good deal of history. We have here many interesting details of medieval franchises and jurisdictions. The men of Chamonix stoutly and successfully maintained their privileges in the matter of criminal justice, and their administration of it seems to have been relatively enlightened and humane. They did burn heretics and witches now and then, but at worst not more than respectable public opinion absolutely required.

Manual of the Coal Mines Regulation Act, 1887. Containing Act, Notes, References, Forms, and Copious Index. By JOHN C. CHISHOLM, Secretary to the Mid- and East-Lothian Coalmasters' Association. Revised by Counsel in England and Scotland. London: Stevens & Sons. 1888. 8vo. xvi and 219 pp.—We have no skill to 'ventilate the workings on the annexed diagram of a fiery mine,' or to 'describe fully the process of blasting in a sinking pit;' in short, this is a book for mine-owners and miners more than for lawyers; but it looks as if the proper things were in it and conveniently arranged.

Benjamin's Treatise on the Law of Sale of Personal Property: with references to the American Decisions and to the French Code and Civil Law. By J. P. BENJAMIN, Q.C. From the latest English Edition, with American Notes, entirely re-written by EDMUND H. BENNETT. Boston, Mass.: Houghton, Mifflin & Co. 1888. La. 8vo. xii and 1010 pp.

A Sketch of the Land Transfer Bill, 1887. By W. H. B. ATKINSON. London: Stevens & Sons. 1888. 8vo. 12 pp.—Having regard to the production of a new and materially revised Land Transfer Bill, we fear this pamphlet is wanting in what the French call *actualité*.

La philosophie religieuse en Angleterre depuis Locke jusqu'à nos jours. By LUDOVIC CARRAN. Paris: Félix Alcan. 1888. 294 pp.—A careful study of contemporary Anglo-Saxon philosophy from the *spiritualiste* point of view. *Ceterum non est de nostra facultate.*

NOTES.

It seems convenient to repeat in a conspicuous place that it is not desirable to send M.S. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE Solicitor-General's unexpected, not to say startling, utterance on the relations of the two branches of the legal profession in England has naturally raised much curiosity and comment. We are inclined to think, however, that whatever movement exists among either barristers or solicitors in favour of so-called 'fusion' is at present a superficial one. At present we make only the following very short observations.

1. A real fusion, in the sense of having either only one qualification for legal practice, or, as in some of our colonies, a double qualification of which a lawyer may take and use in practice either or both branches at his choice, might possibly be a good thing; at all events we cannot say offhand that it would be a bad thing. But to carry it out would require a thorough revision of the existing plan of legal education, and therein of the relations between the Inns of Court and the Incorporated Law Society.

2. If barristers were allowed to do certain parts of solicitors' work, and solicitors to do certain parts of barristers', some benefit would no doubt ensue to some practitioners. We doubt if there would be much gain to the public. As it is, a barrister's powers of seeing clients without the intervention of a solicitor, which are a good deal wider than most people know, are not used to anything like their full extent.

3. In any case we do not believe that law could or would be made materially cheaper to the lay public by any readjustment of the existing division of work. In a community like ours legal work is and must be highly specialized, and the work of the specialist will command its value.

F. P.

The Canada Law Journal is offended by our application of the epithet 'pirated' to the Blackstone Publishing Company's reprints of English textbooks. We used it with full deliberation, and do not mean to enter into any discussion of the propriety of language which is already amply justified by the usage of leading men of letters, and lawyers too, not only in England but in the United States. One of the most learned and best known American text-writers, Mr. Bishop, has quite lately applied the horrible word 'piracy' to proceedings far short of absolute reproduction: see his article in the January—February number of the American Law Review. Moreover the 'national sin of literary piracy' has lately been denounced from the pulpit in New York. We do not mean to say that every non-copyright reprint should be called a piracy; but this is not the occasion to mention the exceptions.

The new Land Transfer Bill cannot be discussed in this number. In form it shows a great improvement on its predecessor of last year; it has dropped the obscure and vexatious method of legislation by minute cross reference, and has become a revised edition of Lord Cairns' Act of 1875,

having regard to the Settled Land Acts, and consolidated with the new scheme of registration. Whatever may be the final judgment of Parliament and the profession, we have to thank the draftsmen for giving us this time the means of criticising their work in the light. From such rumours as have yet reached us we do not think the substance of it will escape criticism.

NATURALISATION.—IN RE BOURGOISE (INFANTS).

The decision given in this case by Mr. Justice Kay on the 12th January last (4 Times Rep. 195) involves questions of considerable importance connected with the naturalisation of Frenchmen in England. Judging from the only reports yet published it appears to me that the judgment itself and the evidence upon which it was based are apt to mislead the public.

The case was shortly as follows: M. Bourgoise, a Frenchman, obtained in 1871 a certificate of naturalisation under the Naturalisation Act, 1870. In 1879 he returned to France, where he resided until he died, leaving a widow and two children. On the death of his widow the family council appointed the maternal grandmother their guardian, and Mr. Johns, their half-brother, an Englishman, was appointed the *subrogé-tuteur*, who is a counter-guardian to represent the interests of the children as against those of the guardian, and not a deputy-guardian as erroneously stated in the case. An application was made on summons by the infants appearing by Mr. Johns as their next friend for his appointment as their guardian. The question was, whether the Court had jurisdiction to entertain the application. Affidavits by French lawyers were read; one of these, filed no doubt on behalf of the French guardian, stated that the proviso inserted in the certificate of naturalisation, viz. that the naturalised subject, while thereunder acquiring all the rights of a natural-born British subject, 'shall not when within the limits of the foreign state of which he was a subject previously to his obtaining his certificate of naturalisation be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect,' rendered naturalisation only partial and incomplete, and did not deprive a Frenchman of his nationality. This affidavit is reported to have further stated that such a qualified naturalisation was looked upon in France as conferring little more than the rights which a foreigner could acquire there under Art. 13 of the Civil Code providing as follows:—'A foreigner who shall have been admitted by authority (of the Emperor, King, or President) to establish his domicile in France shall enjoy there all civil rights so long as he shall continue to reside there,' and that such a grant did not effect nationality. It stated, moreover, that under the decree of 26th August, 1811, no Frenchman could be naturalised in a foreign country without government assent. The other affidavit, filed no doubt on behalf of the applicants, stated that the case was governed by Art. 17 of the Civil Code, which says, 'La qualité de français se perdra par la naturalisation acquise en pays étranger,' that the decree of 1811 did not conflict with this article, and that in any case 'the decree was illegal as having been made in excess of the Emperor's powers.'

Mr. Justice Kay gave his judgment in the sense of the former of these affidavits on the grounds that a certificate of naturalisation with the proviso above-mentioned is not a certificate of naturalisation absolutely to all intents and purposes, but produced its effects only so long as the subject of it did not reside in the country of his birth, unless by the law of that country, viz.

France, this certificate made him cease to be a French subject to all intents and purposes, and that it appeared that he did not under a qualified certificate cease to be a French subject; that moreover Bourgoise did not obtain the state assent requisite under the decree of 1811. The following propositions in the judgment and evidence on which it was founded can, I think, be challenged:—

1. That a certificate of naturalisation in the terms in question is a qualified naturalisation;

2. That such a certificate of naturalisation does not deprive a Frenchman of his nationality; in other words, that the decree of 1811 renders permission of the French government an imperative condition of valid naturalisation abroad.

1. Mr. Justice Kay asked whether naturalisation for a year would deprive a Frenchman of his French nationality, as a *reductio ad absurdum* of the contention that Art. 17 of the Civil Code applied even where the naturalisation was not an absolute one. The answer to this query must no doubt be in the negative; but whether such a qualified naturalisation as this and naturalisation with the proviso in question are to be considered as on the same footing may be disputed. The Act of 1870 says: 'An alien to whom a certificate of naturalisation is granted shall in the United Kingdom be entitled to all political and other rights, powers and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject in the United Kingdom with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalisation, be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof or in pursuance of a treaty to that effect' (Art. 7). Does this proviso in the Act of 1870 operate as an absolute restriction of the effects of the naturalisation? It says the naturalisation shall be absolute unless (and excepting) the state to which the subject previously belonged does not acknowledge it and regards him as still owing it allegiance. If that state does acknowledge it, the naturalisation is absolute. The Act does not qualify the naturalisation, but leaves it to the previous state of the naturalised subject within its own boundaries, and within them only, to qualify it or not as the case may be. It says to the naturalised subject: 'You shall have all the rights of a British subject under this naturalisation, but beware that if your present state does not absolve you from allegiance to it, this country will not step in between you and it.' The proviso in question is merely a consecration of the right of independence of states, of the principle that no state has a right to impose the recognition of its domestic laws or views on another state, or to interfere with another state in the application of its domestic laws to those from whom it claims allegiance.

The proviso of the Naturalisation Act, described as a qualification, is now so universally admitted that it may be said that no other naturalisation exists. Phillimore, writing long before the Act of 1870, said, 'The naturalised person is supposed for the purposes of protection and allegiance at least to be incorporated with the naturalising country.' 'This proposition,' he added, however, 'must admit of one qualification similar to that already mentioned with respect to the domiciled subject, if the naturalised person should have been the original subject of a country which did not allow him to shake off the allegiance (*exuere patriam*). In this event, if he should find himself placed in a situation—the breaking out of war for instance—in which his duties to the country of his birth and of his adoption are at variance, the former country would not regard him as a lawful enemy, but

as a rebel, nor could the *jus avocandi* already spoken of be legally denied to her by the adopting or naturalising country, though the enforcement of the right could not be claimed' (Vol. I. p. 349)¹.

'Every state,' says Phillimore elsewhere, speaking of emigration, 'has an undoubted claim upon the service of all its citizens. Every state has strictly speaking a right of prohibiting their egress from their own country, a right still exercised by some of the continental powers of Europe. These rights are subject to no control or directions as to their exercise from any foreign state' (p. 346)².

The same principle was particularly well indicated from another standpoint by Mr. Marcy in instructions as Secretary of State to Mr. Daniel in 1855 (Nov. 10). 'This Government,' said Mr. Marcy, 'cannot rightfully interpose to relieve a naturalised citizen from the duties or penalties which the laws of his native country may impose upon him on his voluntary return within its limits. When a foreigner is naturalised the government does not regard the obligations he has incurred elsewhere, nor does it undertake to exempt him from their performance. He is admitted to the privileges of a citizen in this country, and to the rights which our treaties and the law of nations secure to American citizens abroad. In this respect he has all the rights of a native-born citizen; but the vindication of none of these rights can require or authorise an interference on his behalf with the fair application to him of the municipal laws of his native country when he voluntarily subjects himself to their control in the same manner and to the same extent as they would apply if he had never left that country. A different view of the duties of this government would be an invasion of the independence of nations, and could not fail to be productive of discord.'

'L'unique chose,' says Fiore, 'qu'on ait le droit d'exiger c'est que le citoyen n'abandonne pas sa patrie avant de s'être préalablement acquitté de ses devoirs envers elle. Aussi on admet généralement que le citoyen ne peut pas renoncer à sa nationalité avant d'avoir accompli son service militaire et qu'on peut traiter comme traître celui qui a porté les armes contre sa patrie' (Nouveau droit international public, 1885. Vol. I. p. 412).

Mr. W. E. Hall sums up modern practice on this point in the following terms:—'A state has necessarily the right in virtue of its territorial jurisdiction of conferring such privileges as it may choose to grant upon foreigners residing within it. It may therefore admit them to the status of subjects or citizens. But it is evident that the effects of such admission in so far as they flow from the territorial rights of a state make themselves felt only within the state territory.' (International Law, p. 107; see also Stoerck in Holtzendorff's *Handbuch des Völkerrechts*, Vol. II. p. 599; Pradier-Fodéré, *Droit International Public*, Vol. III. p. 693; Bar, *Internationales Privat- und Strafrecht*, p. 98.) Hence the qualification of section 7 of the Act of 1870 is a mere legislative acknowledgment of a restriction which is a natural consequence of the principles of the law of nations recognised in the general practice of states. It would exist, whether it had figured in the Act of 1870 or not, as a matter of public policy.

A certificate of naturalisation under the Act of 1870, I therefore venture to submit, is as absolute as any state can make it without invading the independence of other states.

2. As regards the points of French law, the judgment stated that the British certificate did not deprive a Frenchman of his nationality, (a) because the naturalisation in question conferred little more than the rights which a

¹ [This passage stands unaltered in the 3rd ed. 1879, p. 447.]

² [444 in 3rd ed. 1879.]

foreigner could acquire in France under Art. 13 of the Code Napoléon, and (b) because the decree of 1811 provided that no Frenchman could be naturalised in a foreign country without the authority of the government.

The comparison made between the *admission à domicile* under Art. 13 of the Civil Code, which grants no political rights whatsoever, and naturalisation under the Act of 1870, is founded on a misapprehension. It is evident that letters of denization, not a certificate of naturalisation, are what must have been running in the mind of the legal witness whose opinion the Judge adopted. The French Courts have certainly several times decided (Cassation, 29th Aug. 1822; Paris, Appeal, 27th July, 1859) that letters of denization do not fall within the sense of the word 'acquise' in Art. 17 of the Civil Code; but never to my knowledge that a certificate of naturalisation before or after the Act of 1870 was to be treated in the same way.

As regards the decree of 1811, the contention that it was illegal has little or no practical importance in the case in point. The decree may be unconstitutional, but it was not annulled, it has never been repealed, it has been applied by the Courts, it is still considered in force at the Ministries of Justice and Foreign Affairs, and the chief writers of authority, such as Aubry et Rau (Cours de droit civil français, Vol. I. p. 267), Cogordan (Nationalité, p. 160), de Folleville (Naturalisation, p. 308), are agreed as to its being enforceable. I may mention that its repeal is provided for in the Naturalisation Bill now before the Chamber of Deputies.

That the decree makes the permission of the French Government requisite to bring naturalisation abroad under the application of Art. 17 of the Civil Code, however, is quite incorrect.

The first article of the decree of 1811 taken alone would certainly warrant the supposition that the decree prevented naturalisation abroad, and that a person would still remain a French subject, as found by Mr. Justice Kay, unless expressly 'denationalised,' but the context does not bear out such a construction. The other articles provide penalties for naturalisation abroad and forfeitures. Of these one is still enforceable, under which a naturalisation without permission by the French Government entails incapacity to succeed to property in France¹. The preamble, moreover, purports to deal with the 'abandonment of French nationality from a political standpoint.' The decree in fact provides penalties for deserting the mother country, but it does not repeal Art. 17 of the Civil Code, nor am I cognisant of any work or decision of authority which has taken the view that it did so. The following passage is from an eminently practical work (Cogordan, cited above):—'Il semble que dès lors' [after quoting Art. 1 of the Decree of 1811] 'le français qui s'est naturalisé sans autorisation ne doit pas être reconnu comme étranger par la loi française et par suite continue d'être traité en France comme français, mais telle n'a pas été la pensée des rédacteurs du décret. Dans la suite on parle d'individus naturalisés étrangers sans autorisation et il est facile de voir qu'autorisé ou non, le français est toujours dénationalisé, comme sous le régime du Code Civil; mais celui qui n'a pas reçu l'autorisation de l'Empereur est frappé de graves déchéances... Ajoutons que ces décrets sont aujourd'hui surtout un épouvantail destiné à effrayer; en pratique ils ne sont guère appliqués et un grand nombre de français n'hésitent pas à se faire naturaliser à l'étranger sans avoir obtenu l'autorisation du gouvernement, laquelle coûte 675 francs et protège contre des dangers plus apparents que réels.' (Nationalité, p. 160, et seq. See

¹ All foreigners without distinction were under this same disability at the time when the decree was issued.

also M. de Folleville, *Naturalisation*, p. 306, whose statement in the same sense is equally precise.)

Among the cases in which the Courts have decided as above stated may be cited the Zeiter case at Wissembourg in 1860; another at Colmar, 19th May, 1867 (Osterman's case), which might be called the leading one on the subject, and other cases such as Disforet's case at Lille (30th September, 1879), in which the decree could have been but was not invoked.

There is another point in Mr. Justice Kay's judgment connected with the ground on which he declined jurisdiction, but this would raise the whole question of nationality *versus* domicile, and as the subject does not appear to have been broached in the case in point, I leave it alone for the present.

THOMAS BARCLAY.

Regard being had to the well-known doubt as to the right of the lord of a manor in days before the Statute of Merton to inclose land which was subject to rights of common, a doubt which has been recently discussed by Mr. Scrutton, the following entry on a plea roll of 1221 (Coram Rege Roll, Hen. III, No. 14, m. 31) may be read with interest. It occurs among a number of memoranda which seem to have been made by justices holding an eyre in the western counties. These memoranda have as their heading 'Loquendum de hiis,' which probably means that the underwritten matters are to be brought to the notice either of the Justices of the Bench or of the King's Council. The first concerns a purpresture perpetrated by Llewelin. The fourth is this:—*De illis qui habent magnas terras et non possunt essartare de terra sua vel pastura pro illis qui habent j virgatam terre cum sufficienter habere poterunt communam.*

It seems to be thought a grievance that an inclosure may be stopped by a person who has but a single virgate of land and who after the inclosure will still have ample pasture.

F. W. M.

Every quarter that passes adds to the number of the decisions on the so-called conflict of laws. This is no accident. The complexity of modern commerce, the prevailing habit of travel, the constant inter-communication between the inhabitants of different countries necessarily produce cases which depend for decision upon the effect to be given by English courts to the rules of foreign law, and it is in the main a thing to be thankful for that a department of law which has been created during little more than a century is the work of judicial and not of Parliamentary legislation. The recent Law Reports contain at least three cases interesting to every student of the topic conveniently, though with admitted inaccuracy, termed private international law.

Société Générale de Paris v. Dreyfus Brothers, 37 Ch. Div. 215, determines two points of considerable importance. The first is, that the right of a plaintiff to issue a writ for service out of England is subject to the discretion of the Court, that it is not enough for him to show that his case comes within Order XI, r. 1, but that he may also be called upon to satisfy the Court that he has a probable cause of action. The second is, that where the cause of action depends upon the law of a foreign country, e.g. France, the decision of French Courts as to the rights of parties being French subjects and domiciled in France, concerning the matter in dispute will be held decisive by English Courts.

Nouvion v. Freeman, 37 Ch. Div. 244. The Court of Appeal has in this instance reversed the decision of North J. giving effect in England to

a Spanish judgment. It is, however, to be noted that the Court of first instance and the Court of Appeal are agreed in principle. They both hold that the 'final' judgment given by a court of competent jurisdiction in Spain can be enforced by action in England. The difference between the Court below and the Court of Appeal depends upon the different view they take as to the nature of the Spanish judgment sought to be enforced. North J. held that a '*remate*' judgment was a 'final' judgment, in the sense in which the term 'final' is used by English lawyers. The Court of Appeal holds that a '*remate*' judgment is not a final judgment. The nature of a foreign law being a question of fact, the difference between Justice North and the Superior Court is in reality a difference of opinion as to the facts of the case. It is worth noting that Cotton L.J. reiterates in most distinct terms the principle affirmed in *Godard v. Gray* (L. R. 6 Q. B. 139), that a foreign judgment, otherwise valid, will not be invalidated by the fact that the Court delivering it takes an erroneous view of English law.

D is a natural-born British subject, born in England during the year 1792. In 1816 he leaves England and never returns there. Somewhere about 1820 he settles at Naples, and about that date forms a connection—whether of marriage or not is disputed—with *C*, a Neapolitan woman. *A*, the son of *C* and *D*, is born at Naples on the 8th of March, 1821. Soon after this *D* and *C* cease to live together. In 1829 *D* takes up his residence at Lausanne, in Switzerland, and lives there with *A* till 1840, when *A* goes to Hamburg. In 1840 *D* marries *S*. In 1842 *D* is admitted a citizen of the Commune of Riesbach, in the Canton of Zürich. A few months later the governing Council of Zürich grant *D* naturalisation in the Canton, and sanction his citizenship in the Commune of Riesbach. In June, 1853, *D* is divorced from *S*. He then goes to reside in Savoy, at that time part of the Sardinian Kingdom, but in 1859 ceded to France. *D* continues to reside in Savoy till his death in 1878, and dies domiciled in France. According to French law the right of succession to the movable estate of a foreigner, as was *D*, is governed by the law of his nationality. Under a treaty between France and Switzerland the rights of parties claiming to share the estate of a Swiss subject dying domiciled in France, are to be determined according to the law and by the tribunals of Switzerland. *D* leaves all his property by will to *X*, without making any mention of his son *A*. Lengthy litigation takes place between 1879 and 1887 in Zürich with regard to the respective claims of *A* and *X* to *D*'s property. The ultimate result of the proceedings in Switzerland is, that *A* is declared the legitimate son of *D*, and entitled as such to nine-tenths of *D*'s property; and in giving this decision the Zürich Court goes upon the principle that the family rights of *A* are to be decided according to English law, and that according to English law *A* is under the circumstances of the case to be presumed legitimate. An action is brought by *A* against *X* in England to have the Swiss judgment enforced and for a declaration that *D* died in France, a Swiss subject, and that his property ought to be administered in accordance with the law of France.

These are the circumstances (omitting immaterial complications) under which Justice Stirling was called upon in *Trafford v. Blanc* (36 Ch. D. 600) to determine the claim of *A*, *D*'s son, to his father's property. It might well have been imagined that *D* had purposely spent his life so as to raise at his death the greatest number possible of nice points with regard to the conflict of laws. The only point not in dispute was *D*'s domicile. This was admittedly French. Was *D*'s marriage valid? Did he ever become a Swiss

citizen? What was the effect on his citizenship of the Naturalisation Act, 1870? What was the law in accordance with which *D*'s property ought to be distributed? Had the Swiss Courts taken a right view of the law of England with regard to the proof of legitimacy? If not, how far, if at all, did their error affect the validity in England of the Swiss judgment? These were a few of the inquiries submitted to the English judge.

His answer in substance was that, as *D* died domiciled in France, *A*'s rights must be determined according to the law of France, i.e. in the way in which a French Court would determine them. *D*, however, was, in the opinion of Justice Stirling, a Swiss citizen. The law of France is that succession to the property of Swiss citizens shall be determined according to Swiss law. On the matter of Swiss law the decision of the Swiss Courts was decisive. The consequence therefore followed that the Swiss judgment was valid, and that *A* is entitled to nine-tenths of *D*'s movable property.

The judgment is elaborate and interesting. Several of the points decided by it are, it is submitted, clearly right. It is clear that the succession to *D* ought to be distributed according to the law of France, i.e. according to the rules (in this instance the principles of Swiss law) which a French Court would in the particular case follow. It is further clear that the decision of the Swiss Courts ought to be decisive as to Swiss law; and, on the authority of decided cases, it is lastly clear that an error on the part of the Swiss Courts as to the law of England does not invalidate their judgment when brought before an English Court. What is not, however, quite clear, is that Justice Stirling was right in holding *D* to have been a Swiss citizen. It is not quite apparent whether the Swiss Courts, or, what under the circumstances is more important, whether any French Court determined this point. Considering the differing opinions of Swiss lawyers, and the nature of the case, it is at least doubtful whether *D*, though he became a citizen of Zürich, ever became a Swiss subject. Whatever be the right view as to an obscure question of Swiss law, the problem presented is one which can hardly be satisfactorily solved by any English Judge.

The result reached by Justice Stirling was, it is highly probable, right. An inquiry, however, of some practical as well as theoretical importance remains open. Would it not have been better had the English Court followed out to the end the principle that the decision of the right to the succession to *D* depends on the law of *D*'s domicile? The natural result of this principle would seem to be that *A* should first establish his right to *D*'s property in the French Courts, and then, having done this, apply to the English Courts to carry out the French judgment. In other words, there is extreme inconvenience in holding that, while a person claiming the property of a deceased must establish his rights under the law of the deceased's domicile, the claimant need not resort to the Courts of the domicile, and it is to be regretted that English decisions have not established that, as a general rule, the Courts of a man's domicile are the proper tribunals to determine what is the law of his domicile.

In the case of *Trafford v. Blanc*, Justice Stirling was called upon to decide intricate questions of law. In the so-called 'Baralong Marriage Case,' see 4 Times L. Reps. 317, he had to deal with a question of law which run very near to a question of ethics. An Englishman settled in Africa married a woman of the Baralong tribe in accordance with the customs of an uncivilised race. The law of the tribe allows both polygamy and divorce at will. Mr. Bethell, the so-called husband, might have married according to the rites of the Church of England. He did not do so apparently, just because he did not wish to form any closer tie

than that known as marriage among his wife's tribe's people. The provisions of his will further showed a conclusive intention to deal fairly with her and her children in accordance with tribal notions, but almost negated the idea that he meant the woman to occupy the position of a Christian wife. On Bethell's death in a skirmish with the Boers, the question arose whether his child by the barbarian wife was a legitimate son entitled to inherit his father's property under the law of England, or, in other words, whether the connection with the Baralong woman was according to English law a 'marriage.' Justice Stirling held that it was not. His judgment has been blamed by critics who know little of law. With *Hyde v. Hyde* (L. R. 1 P. & D. 130) before him he could have come to no other decision. It must be added that the Baralong case goes a good way to show that the decision in *Hyde v. Hyde* was just. On any view it is idle to talk of these decisions as specially grievances to women. In *Hyde v. Hyde* the sufferer was the husband.

A legal theorist sometimes wonders whether the judges who issued the Rules of Court, 1883, Order XI, were aware that they were raising questions as to the nature and locality of obligations to which English Courts have been little accustomed. That this was the effect of rules determined in the main by considerations of practical convenience becomes clearer every day. Thus *Kaye v. Sutherland* (20 Q. B. D. 147) turns on the inquiry whether, when a tenant of a farm in Yorkshire sues a landlord resident in Scotland for compensation for tenant right according to the custom of the country, the contract sought to be enforced is a 'contract, obligation, or liability affecting land.' The Court determined that it was, but it is impossible not to see that the case is one of a good deal of speculative difficulty. *Robey & Co. v. The Snafell Mining Co.* (20 Q. B. D. 152) also illustrates the point on which we are insisting: A, an engine-maker in England, sues X & Co., a company carrying on business in the Isle of Man, for the price of machinery set up by A for X & Co. in Man. The right to issue a writ out of England depends on the question whether the 'contract' was to be 'performed' in England. It is held by Stephen J. that the contract sued upon was to be performed in England, because the proper place of payment was Lincoln, where A carries on his business. There is a great deal to be said for the decision, but it is certainly open to criticism. The 'contract,' taken as a whole, was a contract to be performed by A in Man, and by X in England. Can it be said that such a contract is 'a contract to be performed within the jurisdiction,' i.e. in England? It was either a contract to be performed partly in England and partly out of England, or else it must be regarded as in effect two contracts. This, it may be suspected, was the view substantially taken by the Judge. It is in itself tenable, but it is not exactly in conformity with the ordinary language of English law, under which a bilateral contract is generally spoken of as one contract.

Oddly enough, 'practice,' though in itself an uninteresting topic, is a branch of law which more often than any other gives rise to curious speculative questions. *Pilley v. Robinson* (20 Q. B. D. 155), for example, deals with as dry a subject as can be mentioned, namely, the joinder of parties. But it in reality raises an interesting question of right as to the joint liability of co-contractors. The case decides in effect that one of several contractors has a right to have his co-contractors joined in an action against him. This is an almost inevitable deduction from the principle maintained in *Kendall v. Hamilton* (4 App. Cas. 504). The case also illustrates another fact which

is often overlooked, namely, that a good deal of the old system of pleading rested so firmly on the principles of the Common Law, and indeed on the maxims of common sense, that changes in the form or nomenclature of our system of procedure do not really change its substance. The Writ of Abatement may in name be abolished, but in reality it survives; and a defendant has still the right to plead to non-joinder of his co-defendants.

In re Gardiner, 20 Q. B. D. 249, is a further illustration of the anomalies of the Married Women's Property Act, 1882. That case decides, and apparently on good grounds, that a married woman possessed of separate estate, but not carrying on a trade separately from her husband, is not subject to the operation of the bankruptcy laws, and cannot commit an act of bankruptcy under the Bankruptcy Act, 1883, sec. 4. In other words, a married woman is, as we have often pointed out, not in reality liable for breach of contract. Piecemeal and unscientific legislation has led to the result that a married woman has the capacity to contract without sharing the liabilities of other contractors. If anyone doubts the truth of this assertion let him compare *In re Gardiner* with *Scott v. Morley*, 20 Q. B. Div. 120, on which we commented in a former number.

Matthews v. Munster, 20 Q. B. Div. 141, is a case which, though rightly decided, may, it is probable, excite the disapprobation of laymen. The Court in effect determine that a counsel has authority, in the absence of his client, to settle the case even when the action is one of malicious prosecution involving questions of character, and even though the client on hearing of the compromise repudiates it. The judgment of the Court is, however, quite defensible. Our whole system of trial depends on the supposition generally well warranted by the facts, that confidence can be placed in the integrity of counsel, and no one who has observed a party conducting his own case can fail to see that clients on the whole gain greatly by leaving their interests in the hands of a trained, and more or less dispassionate representative. Any decision which materially limited a counsel's authority would, on the whole, prevent the attainment of what ought to be the object of every trial—the fair settlement of the question in dispute.

Crampton v. Ridley & Co., 20 Q. B. D. 48, curiously illustrates a point which has not received as much notice as it deserves, namely, the way in which the principles of law are developed through the creation of 'implied contracts' on the parts of the courts. In the particular instance an opinion is expressed by Justice A. L. Smith, that when parties appoint arbitrators 'there is an implied promise by the parties appointing the arbitrators and umpire jointly to pay them for their services.' The principle laid down is in no way unreasonable, but no one can doubt that it has not as yet been fully recognised by the courts, and that Justice A. L. Smith, when making the statement we have cited, in reality laid the foundation for a process of judicial legislation.

X supplies goods to *A* purporting to be of a particular description; he knows that *A* purchases the goods with a view to re-sale. *A* sells the goods to *M* as being of the description under which they were sold to *X*. Until the goods are used there is no means of knowing whether they answer the description or not. They do not answer the description, and *A* is sued by *M* for breach of contract. *A*, on the assurance of *X* that the goods really

answer the description under which they were sold, defends the action, and *M* recovers damages. *A* can in his turn recover these damages from *X* in an action for breach of warranty. This is the point determined by *Hammond v. Bussey*, 20 Q. B. Div. 79, and is, it seems, a fair deduction from the second part of the rule in *Hadley v. Baxendale*, 9 Ex. 341. Lord Esher's judgment should be specially noted as showing that the rule for determining the measure of damages for breach of contract, or, in other words, for deciding the true meaning of a contract, is to look to what damages 'may reasonably be supposed to have been in the contemplation of the parties.' Here, as elsewhere, the true meaning of a contract is determined by considering what is the meaning which a reasonable man would have put upon it under the circumstances of the case at the time when it was made.

The appeal in *Bentineck v. Fenn (Re Cape Breton Co., 12 App. Cas. 652)* unfortunately went off for want of any evidence that the selling director had not disclosed his interest in the property to the company. The measure of liability in such a case remains therefore unsettled, but Lord Macnaghten expressed an opinion (at p. 671) that if a director abstained from disclosing his interest and thus led the Board to purchase the property for more than it was really worth, it would be very difficult for him to escape from the charge of fraud. If so, such fraud would found an action of deceit, in which the excess over the true or market value would be recoverable, not perhaps as profits, but as damages. This will probably be sufficient to satisfy Lord Justice Bowen's moral sense. But what if the director uses his voting power as a shareholder to procure the ratification of the contract? This was the case in *North-West Transportation Co. v. Beatty* (12 App. Cas. 589). There the defendant director Beatty had sold a ship of his own to the company, and the contract being voidable a dispute arose whether the purchase should be ratified by the company. At the meeting, Beatty, being holder by himself and his nominees of more than half the shares, used his voting power to control the company in his own interest and carried the ratification. The Privy Council held that he was entitled to do so. Such a proceeding involves no conflict of interest and duty: for the two characters of director and shareholder are distinct. As was said in *East Pant Du Mining Co. v. Merryweather* (10 Jur. N. S. 1231) the disability of a director of a public company to vote in reference to a contract in which he is interested is only as director or trustee and not as shareholder. *Qua* shareholder he is not in any fiduciary relation, but a principal. Little harm is likely to result, for in proportion to the influence of his vote is the director's stake in the company.

The House of Lords has lately dealt with other leading cases of which we reserve critical notice until we have a full report. It has affirmed the decision of the Court of Appeal in *The Bernina* and in *Bunch v. G. W. R. Co.* and reversed it in *Easton v. London Joint Stock Bank*.

Leeds Estate Building Co. v. Shepherd (36 Ch. D. 787) recalls to mind the amusing passage in Lucian's Dialogues of the Dead, in which the chief actors in the Trojan war meeting in Hades try to shift the blame on to each other, Menelaus on Helen, Helen on Paris, Paris on Aphrodite, and so on. In vain! for Rhadamanthus, in the person of Mr. Justice Stirling, has fixed directors, manager, and auditor alike with liability. This is the first occasion on which auditors have been held liable or their duties defined. An auditor

must not confine himself merely to the task of verifying the arithmetical accuracy of the balance sheet, but must inquire into its substantial accuracy, must ascertain that it contains a proper income and expenditure account, and a true and correct representation of the state of the Company's affairs. Anything less than this would make auditing illusory, a mere sham. The decision effectually dispels the notion that an auditor, because he is paid a small fee, may perform his duties in a perfunctory manner or rather not at all. It dispels too the notion that directors can evade liability by professing ignorance of the mode in which the balance sheets have been prepared and of inaccuracies in them, and saying (even truthfully) that they trusted to the manager and auditor. Directors are entitled to employ skilled agents such as auditors and to rely on their reports, but, like trustees, they cannot delegate their responsibilities to such agents. They must exercise their judgment as business men on the reports or balance sheets submitted to them, must apply their minds to them, just as trustees must to an investment approved by their valuer (*Leavoyd v. Whiteley*, 12 App. Cas. 727). In a word, they, like auditors, must do their duty. Utopia was a great success, because all the Utopians were reasonable, virtuous, and obedient. If directors, promoters, managers, auditors, and secretaries could all be got to do their duty, what might not the City become?

Mr. Justice Kekewich disapproves the practice of citing as authorities the text-books of living authors and particularly of authors on the bench under the notion that these latter possess a quasi-judicial authority (*Union Bank v. Munster*, 37 Ch. D. 51); and this disapproval he tells us is shared by other judges. *Humanum est errare*: and this particular error of supposing that Lord Justice Fry the author and Lord Justice Fry the judge will take the same view on, say, a question of specific performance may be illogical but is certainly natural; as natural as that other illogical assumption, that the Court of Appeal sitting as a Divisional Court will take the same view in a higher sphere. True the author-judge has not had the rather questionable advantage of hearing argument, but then he is peculiarly conversant with the subject-matter. Lord Justice Bowen recently observed that *obiter dicta* were like chickens and came home to roost: the remark will apply to judge-written text-books. Only judges can help uttering *obiter dicta*, they cannot help having written text-books. The question which evoked Mr. Justice Kekewich's observations was whether on a sale by a mortgagee, the mortgagor employing a puffer would entitle the purchaser to resist specific performance, though the mortgagee was neither party nor privy to the fraud. Lord Justice Fry the author thought it would. Mr. Justice Kekewich decided that it would not. Perhaps both may be right. The fraud by a stranger is no such fraud as would render the contract voidable, yet it might be such that the Court would think it unfair to force the contract on the purchaser by a decree of specific performance.

What is sauce for the goose is not always sauce for the gander. In other words, a widow's antenuptial settlement in favour of the children of her first marriage may be treated as for value while a widower's is voluntary (*Re Cameron & Wells*, 37 Ch. D. 32, following *Price v. Jenkins*, 4 Ch. D. 483). Certainly it must be admitted that the authorities as to what persons are and what are not within the so-called marriage consideration are not in a very creditable state. Mr. Justice Kay goes further, and frankly confesses himself quite unable to understand the principle of Lord Hardwicke's decision in *Newstead v. Searles* (1 Atk. 265), upholding a widow's antenuptial

settlement in favour of the children of her first marriage against a subsequent mortgagee. For where, argued the learned judge, is the consideration moving from the children? Yet this decision has been followed in *Clarke v. Wright* (6 H. & N. 849) and *Gale v. Gale* (6 Ch. D. 144) and recognised as law in *Mackie v. Herbertson* (9 App. Cas. 303). The fact is that so long as the question is treated as one of who are within the marriage consideration, whether it be the children of the intended marriage or the issue of a former marriage, illegitimate children or collaterals, so long will the question continue to perplex learned judges. The true view it is submitted, the view which alone is consistent with all the decisions and is supported by eminent text-writers (Dart, V. & P., 6th ed., 1013; May, Fr. Ass., 2nd ed., 353), is that expressed by Mr. Justice Blackburn in *Clarke v. Wright*:—Was there a bargain on behalf of such children or collaterals by the wife or husband as the case may be? If there was such a bargain as part of what Lord Hardwicke terms the 'reciprocal considerations' between husband and wife on the marriage settlement, then the limitations in favour of such children or collaterals are not voluntary, though no consideration moves from them direct.

Suppose, as the late Mr. Dart suggests, that *A* agrees to pay *B* £10,000 in consideration of *B* conveying an estate to the use of *A* for life with remainder to a stranger the money paid and the conveyance executed, could it be said that the limitations in the settlement *ultra A's* life were void upon the ground of the remainderman not being within the consideration of the £10,000? In such a case the purchase, whether the conveyance is to *A* and another jointly or to *A* and another successive, is a purchase by *A*, and a resulting trust of the remainder arises in favour of *A*, who advances the purchase money (*Dyer v. Dyer*, 1 L. C. 223). If this resulting trust is settled on *A's* marriage in favour of *A's* collateral relations, they take through a purchaser for value, and their title is therefore good against a subsequent purchaser or mortgagee from *B*. Where the limitation of the remainder is in favour of *A's* children the resulting trust is no doubt rebutted, but only as between *A* and his children, not as between *A* and *B*. The question whether in fact the wife or husband has bargained for particular limitations is one that may be either presumed or proved. In favour of the children of the intended marriage it is always presumed, semble it is so in case of a widow in favour of the children of a former marriage. In other cases as the children of a widower by a former marriage or of collaterals of the husband or wife it must be proved. Mr. Justice Blackburn gives a fair test. 'Where the limitations so interfere with those which would naturally be made in favour of the husband and wife and issue so as to indicate that the limitations must have been discussed and made part of the marriage contract part of the reciprocal considerations between the husband and wife, the presumption (that the stipulations were confined to the wife, the husband, and the issue) is rebutted and the limitations are not voluntary.'

Though the Companies Act has now been more than a quarter of a century in operation, its policy and provisions seem still only beginning to be understood. The price of the privilege of limited liability, as Lord Justice Turner said, is conformity to the conditions imposed by the Legislature, and one of those conditions 'fundamental and inviolable' is that the capital which alone is available to meet the claims of creditors shall not be reduced either directly or indirectly except in the manner provided by the Acts. This is why a company cannot purchase its own shares (*Trevar v.*

Whitworth, 12 App. Cas. 409). This is why there can be no set off against calls (*Grissell's Case*, 1 Ch. 528; *Re Whitehouse & Co.*, 9 Ch. D. 595), and this is why a company cannot issue its shares at a discount. The discount is so much withdrawn from the creditors' security. Until the recent case of *Re Addlestone Linoleum Co.*, *Benson's Case* (37 Ch. Div. 191), *Re Ince Hall Co.* (30 W. R. 945, followed by the same judge without comment in *Re Plaskynaston Tube Co.*, 23 Ch. D. 542) was the only authority on the issue of shares at a discount. In that case the shares were new shares, and Mr. Justice Chitty thought the issue at a discount was a disposal 'beneficial to the company' within Art. 28, Table A: on which it may be observed that if the issue at a discount were *ultra vires* the company, no article sanctioning it could avail. *Re Addlestone Linoleum Co.* decides two important points: (i) That registration of a contract under s. 25 of the Companies Act, 1867, does not make any difference or protect the allottee at a discount from payment in full on a winding up. Registration of a contract under the section only relates to the mode of payment, not the amount. It meets the case where the shares are paid for otherwise than in money or money's worth; but the full price in one way or another must still be paid. (ii) That a registered holder of shares issued at a discount cannot prove in the winding up in competition with creditors for damages for the default of the company in registering a contract under s. 25 (overruling *Mudford's Case*). This may be supported by s. 38 (7) of the Act of 1862, but the true ground is that taken in *Houldsworth v. City of Glasgow Bank* (5 App. Cas. 317), that the shareholder cannot take away in damages what he has agreed to contribute in any event to the creditors' fund. This is only another illustration of the inviolability of capital. The practice of underwriting companies, and for this purpose issuing shares at a discount to brokers, is becoming very common now, and it is most undesirable that any financial hocus pocus of this kind should secure the allottees immunity from their just liabilities.

The Duke of Devonshire v. Pattinson (20 Q. B. Div. 263) promised some curious antiquarian research into the royal prerogative of fishing; but after an interesting glimpse of the king sending his writ to the sheriff to close the river in preparation for his 'going a-angling,' as old Izaak Walton would say, the case resolved itself into a question of the construction of a grant. Hardly more than a year ago the Court of Appeal in *Micklethwait v. Newlay Bridge Co.* (33 Ch. Div. 133) affirmed the principle that a grant of land abutting on a river will be presumed to pass the bed of the river *ad medium filum aquae*; but this presumption is rebuttable, and rebuttable not merely (i) by the terms of the grant, but (ii) by evidence of subsequent user (in cases of old grants), e.g. the right of fishing having always been treated as a separate tenement, and (iii) by the subject-matter of the grant. Speaking of the analogous presumption *cujus est solum ejus est usque ad caelum et ad inferos*, Ashhurst J. in *Doe d. Freeland v. Burt* (1 T. R. 703) said, 'We know that in London different persons have several freeholds over the same spot. That is the case in the Inns of Court. Now it would be very extraordinary to contend that if a person purchased a set of chambers, leased them, and afterwards purchased another set under them, the after-purchased chambers would pass under the lease. . . . The construction of all deeds must be made with reference to the subject-matter; and it may be necessary to put a different construction on leases made in populous cities from that on those made in the country.' This principle is as applicable in determining what quasi easements pass under a grant as what parcels. *Prima facie*, as *Wheeldon*

v. Burrows (12 Ch. Div. 31, at p. 49) shews, there will pass to the grantee all those quasi easements which are necessary to the reasonable enjoyment of the property granted. Hence a person selling a house with windows in it cannot build on the remainder of the ground so near as to stop the lights of the house, and as he cannot do so neither can his vendee (*Palmer v. Fletcher*, 1 Lev. 122: *Allen v. Taylor*, 16 Ch. D. 355). But what if the grantee of the house knew that the grantor intended to use the adjoining land for building? This was the question put hypothetically by Lord Justice Cotton in *Rigby v. Bennett* (21 Ch. Div. 559), and which actually arose in *Birmingham & Dudley Bank v. Ross* (57 L. J. Ch. 109), a grant of a building with windows in the business quarter of a town. Mr. Justice Kekewich adopted the opinion of Baron Wilde in *Hall v. Lund* (1 Hurl. & C. 676), that in cases of implied grant the implication must be confined to a reasonable use of the premises for the purpose for which according to the obvious intention of the parties they are demised, each case depending on its own circumstances. 'I hold,' said the learned judge, 'that the grantee of the house knew that the grantor intended to use the retained land for the purposes of building houses of business, and that what has been in fact erected thereon is not in excess of what he must be taken to have expected and assented to be erected.' This does not qualify the doctrine of a grantor not derogating from his grant. The grantor's right to build is not a reservation, but an exception: it is a more correct explanation than saying that the purchaser takes the property subject to all equitable interests of which he has notice.

Not to possess trustee-corporations argues us, to Mr. Justice Kay's mind, in a very backward state of civilization. Lord Hobhouse's carefully drafted Trust Companies Bill is not to become law this year, but the change is wanted and will come. Trustees will welcome it, for what office is so thankless as a trusteeship (except an executorship), or indeed so perilous? In vain are the trustee's best intentions, in vain is the ideal prudent man of business paraded before him in leading cases: he finds himself too late involved in a breach of trust, and the victim of remorseless *cestuis que trust*, for whom he has been over-zealous or to whose importunity he has weakly yielded. *Cestuis que trust* will welcome it, for it offers almost absolute security; and those conversant with the mysteries of the Chancery Division know well how large a part of the business of that branch is taken up with fraudulent and defaulting trustees. Whether the Bill will be equally welcome to the 'family solicitor' is more doubtful. The settlor or testator may authorise the work to be done by his own solicitor, but if he does, the Trust Company is not to be liable for such solicitor's 'negligence, misfeasance, non-feasance, or misconduct,' an alarming array of possibilities in view of which the settlor or testator may not care to run the risk. The most vital question, at what price these advantages are to be had, is left blank, to be determined by the Company's articles or by special agreement. Probably it is thought that charges will be brought to the lowest point by the competition of rival Trust Companies. *Hiddings v. De Villiers* (12 App. Cas. 624) shews that even a Trust Company may require looking after in the matter of charges.

Thrussell v. Handyside, 20 Q. B. D. 359, is perhaps too obviously right to be a very 'profitable' decision in the sense of our old writers. A hopeless case appears to have been argued with considerable ingenuity: the appellant's contention really came to this, that if *A* is working in the roof

and *B* on the floor of the same building, both having an equal right or duty of being there, *A* may perhaps be liable for dropping one rivet on *B*'s head, but after the first may, on the principle of *volenti non fit iniuria*, drop any further number with impunity, and *B*'s only remedy is not to work there at all. Knowledge of a risk may be evidence that one accepts the risk, but it is evidence at most.

R. v. Buckmaster, 20 Q. B. D. 182 (C. C. R.) is a plain case of 'larceny by a trick,' which adds nothing to the theory of the subject. The prosecutor deposited his money with a view to a genuine bet, the prisoner took it for the sole purpose of keeping it for himself at all events. On the one side there was no intention to part with the property, on the other there was the intention to deprive the prosecutor of it, therefore possession was not really delivered, but taken by a trick, the prisoner was a mere trespasser, and all the elements of larceny were present.

In *Merivale v. Carson*, 20 Q. B. Div. 275, the Court of Appeal has confirmed what we have always thought the true view of the ground on which fair criticism of matters fairly open to public comment is not actionable; namely, not that it is in the nature of a privileged communication, but that it is not a libel at all. As Bowen L.J. says in his judgment, in cases of privilege some one has a special immunity; *A* may say to *B* what *C* may not say, or what *A* might not say to *Z*. But the right of passing public judgment on things submitted to the public is a common and equal right of all men. Hence the critic's motive is not in issue. If the criticism be unfair, it is no excuse that he wrote in misguided zeal and not of malice; though perhaps the converse does not hold, for Lord Esher suggests (p. 281) that a comment proved to be malicious would not be real criticism at all. On the whole, the law declared in *Campbell v. Spottiswoode*, 3 B. & S. 769, 32 L. J. Q. B. 185, is maintained, and whatever is contrary to it in *Henwood v. Harrison*, L. R. 7 C. P. 606, is overruled.

The last few months have produced a crop of cases on covenants in restraint of trade. The conditions of trade have, it is obvious, greatly changed since the reign of Henry VIII, and are still changing; increased facilities of communication have enlarged the area of necessary protection. No absolute standard can be adopted; and this being recognised, the tendency of the modern authorities has been to accept as the test of reasonableness whether the covenant goes beyond what the covenantee's interests require or not; if it does not, it is valid; if it does, it is invalid (*Leather Cloth Co. v. Lorrant*, L. R. 9 Eq. 345; *Rousillon v. Rousillon*, 14 Ch. D. 351; *Davies v. Davies*, 36 Ch. Div. 359, 56 L. J. Ch. 481), encroaching thus on the older authorities, *Ward v. Byrne* (5 M. & W. 548), and *Hinde v. Gray* (1 Scott N. R. 123), which treated it as clear law that a covenant not to carry on a lawful trade unlimited as to space was on the face of it void. In *Davies v. Davies* (to which we could barely call attention in the January number) a partner in a firm of galvanised iron manufacturers at Wolverhampton covenanted 'to retire wholly and absolutely from the partnership, and so far as the law allows from the trade or business thereof in all its branches, and not to trade, act, or deal in any way so as either directly or indirectly to affect' the continuing partners. Kekewich J. held that the words 'so far as the law allows' meant so far as the doctrines of English law as interpreted by the decisions of the Courts allowed, and was not too vague, nor its restrictions unreasonable. The Court of Appeal (36 Ch. Div. 359) reversed this

decision, holding (1) that the parties must themselves fix the limits, and not leave it to the law to do so; and (2) that the covenant was either a covenant to retire altogether from business, and as such void, or at all events too vague to be enforced. While inclining to mould the law so as to meet the exigencies of modern trade, the majority of the Court were of opinion that the older doctrine requiring every restraint of trade to be partial was too 'engrained' in our law to be abrogated by any authority but that of the House of Lords. *Leather Cloth Co. v. Lonsont* was, as the Court observed, a peculiar case, the restriction there against trading being, as Wickens V.C. pointed out in *Allsopp v. Wheatcroft* (L. R. 15 Eq. 64), 'only a consequence of a clearly lawful restriction against divulging a trade secret.'

This opinion, however, is not part of the decision. For, though Cotton L.J. based his own decision on that ground (see at p. 398), Bowen L.J. did not (see at p. 391), and Fry L.J. adhered to his former opinion (p. 396). It is disappointing to find Cotton L.J. repeating the old error that a case in the Year Book of Henry V (2 Hen. V. 5, pl. 26) 'laid down generally that covenants in restraint of trade are bad.' The condition in that case was in fact limited to one town in space and to half a year in time, and the opinion that it was against the common law was expressed only by one judge. The defence actually made was that the condition had been performed.

A covenant in restraint of trade, though too extensive, may nevertheless if severable be enforced to the extent to which it is reasonable. There are several instances of such a covenant being held severable as regards space. In *Baines v. Geary* (35 Ch. D. 154) the covenant was held severable as regards time, following *Nicholls v. Stretton* (10 Q. B. D. 350). In *Vernon v. Hallam* (34 Ch. D. 748) a covenant against trading under a particular name was held good, though unlimited as to space. In *Hill v. Hill* (35 W. R. 137) a covenant not to engage in or be in any way concerned or interested in a similar business within ten miles of the Royal Exchange was held broken by the covenantor becoming an employé in a firm engaged in a similar business within the prohibited radius. In *Parsons v. Cotterill* (56 L. T. R. 839), a radius of 50 miles from Burton-on-Trent was held not an unreasonable restraint for a wine and spirit firm to impose when engaging a traveller, without any limit of time.

Covenantees desiring the maximum of protection have no doubt a difficult task. When they fail it is commonly because, like the dog in the fable, they grasp at too much and so lose all.

Few are the readers who note minute errors in the books they read, fewer those who have the charity (for it is the truest charity) and will take the pains to communicate them to the author. The Editor of this REVIEW received some valuable corrections the other day from an anonymous correspondent, and having no other means of expressing his thanks to the unknown writer, begs to thank him here. It may be added that among scholars definite and verifiable corrections, offered for sound learning's and not for controversy's sake, are always acceptable. Neither should any one assume that the communication of obvious corrections is superfluous. For a flagrant error, the omission of a 'not' for instance, or the substitution of 'purchaser' for 'vendor,' is just that which, if it escapes the author and the printer once, is likely to escape them again.

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(The titles of articles in foreign reviews are given in the original, translated, or abridged in English, without any fixed rule, as appears in each case most convenient for our readers.)

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Gneist on the English Constitution (G. W. Prothero)—The claim of the House of Orleans to Milan, Part I (Miss A. M. F. Robinson)—Benoît de Boigne (Sidney J. Owen)—Notes and Documents—Reviews—Recent Historical Publications.

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